RECORD, CASE Nos. 13,698, 13,703, 13,704, & 13,705.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 124.

ALEXANDER M. BYERS, ADMINISTRATOR *CUM TESTAMENTO ANNEXO* OF MARY McAULEY, DECEASED, APPELLANT,

vs.

ROBERT F. McAULEY ET AL.

FILED OCTOBER 5, 1889.

TERM No., 128.

HENRY B. SHIELDS, APPELLANT,

vs.

ROBERT F. McAULEY ET AL.

TERM No., 129.

HENRY B. SHIELDS AND MELISSA M. SHIELDS, HIS WIFE, IN RIGHT OF SAID MELISSA M. SHIELDS, APPELLANTS,

vs.

ROBERT F. McAULEY ET AL.

TERM No., 130.

DORA McAULEY, RILLA WILSON, ET AL., APPELLANTS,

vs.

ROBERT F. McAULEY ET AL.

FILED OCTOBER 7, 1889.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

by their attorneys." The *fact* is that said cause was called for trial on the last day of the May term, at the last hour of the trial day, when plaintiff and his attorney were absent, no notice had been served that the continuance obtained on the first day of the term had been set aside, and plaintiff was not expecting it and had no knowledge of it. This fact is shown in the record. (See p. 7)

Plaintiff in error insists that the orders of the court below, setting aside the continuance of said action, without notice to plaintiff and during the absence of his attorney, and permitting said cause to be called in like manner for trial, at the last moment of the term, was arbitrary and unjust to him.

Under this state of facts, the court erred in overruling plaintiff's motion for a new trial.

Plaintiff prays that he may be awarded a new trial, and that defendants may be decreed to pay the costs of this appeal as a condition precedent to their further maintaining their defence therein.

JOHN S. GREGORY,
Attorney for Plaintiff in Error.

149 U.S. 608

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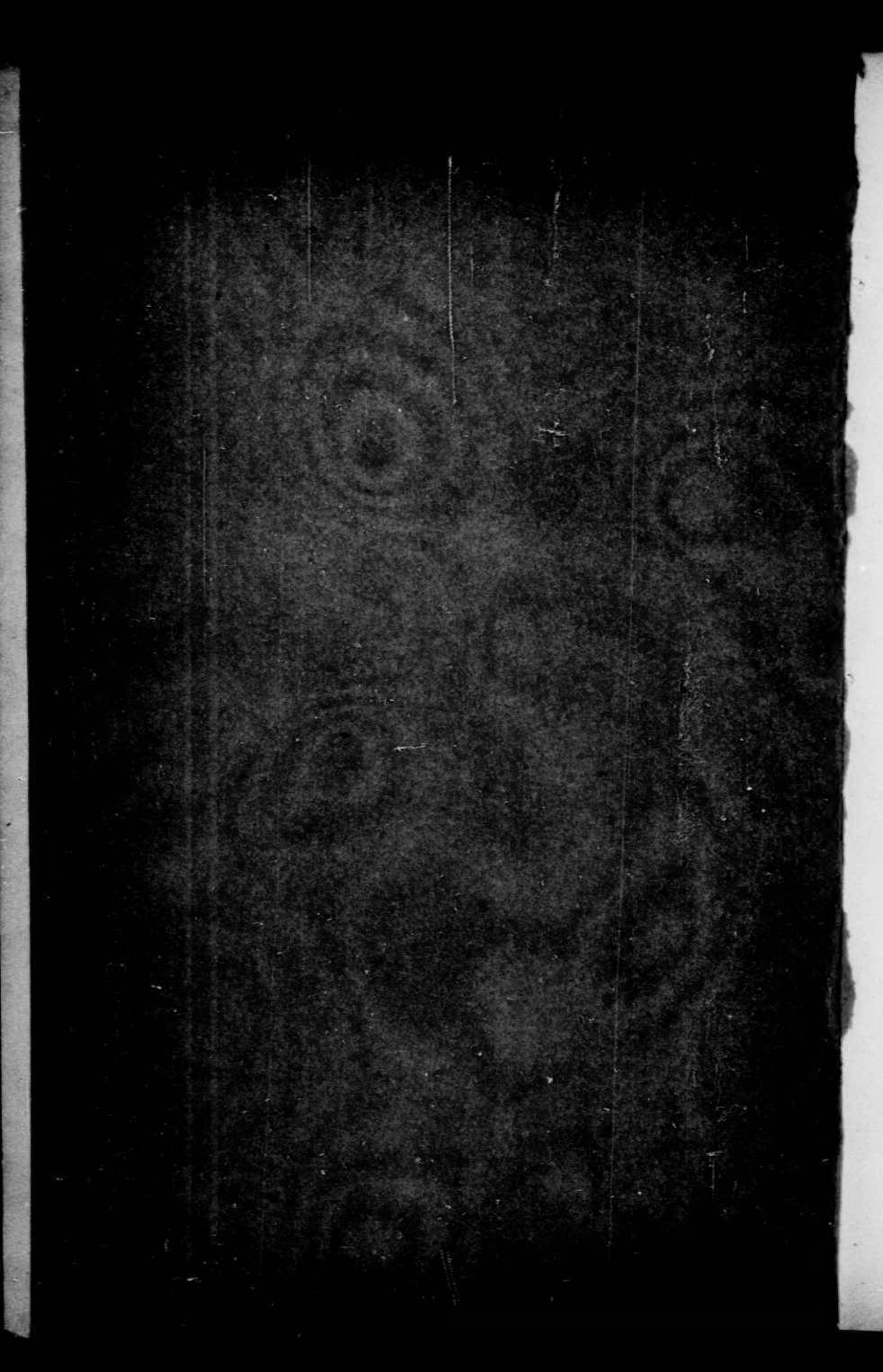

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1 Among the rolls, records, and judicial proceedings had in the circuit court of the United States for the western district of Pennsylvania entered at No. 19, May term, 1887, equity, wherein H. B. Shields and wife are defendants and Rob't F. McAuley *et al.* are defendants, may be found the following words and figures, to wit:

Equity Docket Entries.

HENRY B. SHIELDS, a resident and citizen of the State of Ohio, assignee of James McAuley, a resident and citizen of the State of Kansas, and Henry B. Shields, in right of his wife, Melissa M. Shields, also a resident and citizen of the State of Ohio,

against

ROBERT F. MCAULEY, MARY DOUGLASS, SUSAN BLAKELY, SARAH M. Hill, Robert F. M. Campbell, Mary Parker, Jane Stewart, all citizens of the State of New York; Rev. John McAuley, a citizen of the State of New Jersey and resident therein; Martha Jane McGogney and William B. McGogney, her husband; Margaret P. Hugus and N. H. Hugus, her husband; Caroline Watson, Dr. William Watson, Wilson Stewart Watson, James M. Watson, Julia Ash, Ebenezer McBurney, Kate Gault, Sarah Thompson, Martha Crawford, Ebenezer McBurney, all citizens and residents of the State of Pennsylvania; William Parker, a citizen and resident of the State of Iowa; Eliza Paul, Rilla Wilson, and Dr. J. M. Wilson, her husband; Mary Montgomery and Dora McAuley, all residents and citizens of the State of Illinois; Eliza A. Egbert and Thomas McAuley, residents and citizens of the State of Cali-
2 fornia; James Campbell, a resident and citizen of the State of Nebraska; Thomas M. Watson, a resident and citizen of the State of Alabama; Margaret Ann Payne, a resident and citizen of the State of Minnesota; Ann McCauslin, whose residence is unknown, none of whom are residents and citizens of the State of Ohio; Mrs. Eliza M. Zanningo, a resident and citizen of the State of Iowa; Heirs-at-Law of Mary McAuley, late of the city of Pittsburgh, in the State of Pennsylvania, deceased, and Alexander M. Byers, administrator *cum testamento annexo* of the estate of said Mary McAuley, deceased, said Alexander M. Byers being a citizen of the State of Pennsylvania; "The Home of the Friendless" and the "Home for Protestant Women," both corporations of the State of Pennsylvania, operating with the western district thereof.

Bill filed March 28, 1887. Same day subpœna issued, returnable first Monday of May next.

1887, May 4.—Precipe for appearance of D. T. Watson, Esq., for A. M. Byers, adm'r, filed.

1887, May 10.—Plea of A. M. Byers, adm'r *c. t. a.*, filed.

1887, May 17.—Argument had on plea of A. M. Byers, adm'r.

1887, May 18.—Plea overruled. (See order on argument list.)

1887, March 28.—Subpœna served on A. M. Byers, adm'r, personally and by copy, and by direction of W. M. Watson, Esq., acting

for compl'ts, other defendants not served; mar., $2.50; writ returned May 31, 1887.

1887, June 7.—Alias subpœna issued, returnable first Monday of July next.

1887, June 27.—Stipulation as to plea of A. M. Byers filed by leave of court, *nunc pro tunc*, as of May 17, 1887.

3 1887, June 29.—Answer of A. M. Byers filed.

1887, June 9.—Service of subpœna accepted by W. M. Watson, Esq., for Dr. Wm. Watson, Wilson S. Watson, Mrs. Rilla Wilson, Dr. J. M. Wilson, Dora McAuley, Thos. M. Watson, Martha Jane McGogney, Wm. B. McGogney, Margaret P. Hugus, and N. H. Hugus. Same day service accepted by D. F. Patterson, J. W. Donnan, and J. M. McBurney, Esqs., for Ebenezer McBurney, Ebenezer M. Burney (sued as Ebenezer McBurney), Sarah Thompson, Catherine Gualt (sued as Kate Gualt), Eliza M. Monzingo (sued as Mrs. Zanningo), and Martha Crawford. June 11, served on "Home of the Friendless" by giving true and attested copy thereof to Mrs. R. McKnight, pres't board managers; *non est* as to other defendants. Mar., $37.68.

1887, July 16.—Precipe for appearance of W. M. Watson, Esq., for Thos. M. Watson, Dr. W. Watson, James M. Watson, Martha J. McGogney, W. B. Gogney, Margaret P. Hugus, N. H. Hugus, Catharine Watson, W. S. Watson, Dora McAuley, and Rilla and J. M. Wilson filed; also precipe for appearance of Lyon & Shoemaker for Mary and J. A. Montgomery, Martha A. and D. C. Payne, Eliza and Eli Paul, Mary Parker, Jane Stewart, J. A. Stewart, Wm. M. Parker, Sarah Hill, and Rob't F. Campbell filed.

1887, July 16.—Answer of Mary Montgomery, Joseph A. Montgomery, Margaret Ann Payne, Dexter C. Payne, Eliza Paul, Eli Paul, Mary Parker, Jane Stewart, John A. Stewart, Wm. Parker, Sarah Hill, Rob't F. Campbell, Rilla Wilson, Dr. J. M. Wilson, Dora McAuley, and Thomas M. Watson, *of* respondents, admitting the allegations of the bill and praying that they be made plaintiffs to the bill presented and filed, and, on motion, rule granted

4 to show cause why the prayer thereof should not be granted, &c., returnable 10 days after notice. Same day proof of service of notice of above application filed.

1887, Sept. 2.—Answer of Ebenezer M. McBurney *et al.* filed.

1887, Sept. 8.—Demurrer of the "Home of the Friendless" filed.

1887, Oct. 19.—Upon motion of counsel for Ebenezer M. McBurney *et al.* for an order dismissing the suit as to them in fault of a replication to their answer, order granted directing motion to be filed and fixing Saturday, Oct. 22, 1887, at 10 a. m., for hearing. Notice to be given complainants' solicitors.

1887, Oct. 22.—The hearing on motion to dismiss the bill in default of a replication adjourned until Saturday, Oct. 29, '87.

1887, Nov. 22.—Answer of the "Home of the Friendless" filed.

1887, December 1.—Complainants' replication filed.

1887, Dec. 3.—Petition of A. M. Byers, adm'r, for authority to sell or exchange stock of the Citizen-' Pass. R'y Co. presented and same ordered to be filed and Dec. 10, 1887, fixed for hearing.

Notice to be given all counsel of record herein. Same day proof of service of notice of hearing on above petition filed.

1887, Dec. 10.—The petition of A. M. Byers, adm'r, came on for hearing, and order granted adm'r to accept seven shares of Traction Co. stock for one share of Citizens' Passenger R'y stock, and to make such exchange for all Citizens' Passenger R'y Co. stock he holds, and after the exchange to hold the Traction Co. stock as assets of the estate of Mary McAuley, dec'd.

1887, Dec. 21.—Order granted appointing Geo. B. Motheral
5 examiner to take testimony in above case. Same day certificate of appointment issued.

1888, Jan'y 14.—Precipe for appearance of E. P. & C. W. Jones for Margaretta Shear, Rob't F. McAuley, and Susan Blakeley filed. Same day, upon motion, order granted permitting Margaretta Shear, Robert F. McAuley, and Susan Blakeley to adopt as their answer to the bill of complaint the answer of Ebenezer McBurney filed Sept. 2, 1887, filed.

1888, March 16.—Petition of "The Home for Aged Protestant Women" presented in court praying to be permitted to intervene and become a party defendant, and, on motion, order granted allowing said petitioner to intervene as a defendant; filed.

1888, May 23.—Testimony taken before Geo. B. Motheral, Esq., special examiner, filed.

1888, May 24.—Cause came on for hearing on the validity of the will of Mary McAuley, and was argued by counsel C. A. V. Same day, all parties having agreed, order granted fixing the fee of Geo. B. Motheral, Esq., special examiner, at the sum of one hundred and twenty-five dollars and directing adm'r to pay same; filed.

1888, May 29.—Cause came on to be heard on bill, answer, and testimony, and decree granted that an account of the personal estate be stated by Alexander M. Byers, adm'r of Mary McAuley, dec'd, before Cicero Hasbrouck, Esq., who is hereby appointed master in this case, and that after notice to parties and time given for filing exceptions to this account the said master is directed to pass upon any exceptions which may be filed and take testimony as to
6 the parties interested in the distribution of the balance in the hands of the administrator and to report said testimony with schedule of distribution to the said court, filed. Same day certificate of appointment issued to appointee.

1888, June 12.—Petition of Elizabeth Carr praying to be allowed to intervene as a party defendant presented and rule granted upon the other parties to the record to show cause why the prayer thereof should not be granted, returnable June 23, 1888.

1888, June 23.—Proof of service of notice of motion of Elizabeth Carr to intervene filed. Same day order granted allowing Elizabeth Carr to intervene as a party defendant as prayed for in her petition, filed. Same day precipe for appearance of W. M. Watson, Esq., for Elizabeth Carr, intervening defendant, filed.

1888, November 1.—Master's report; master's minutes of proceedings before him and exhibits, being account and supplemental account of adm'r; exceptions (2) to account of adm'r; assign-

ments of J. H. McAuley to Geo. T. Jackson and IdaMc Auley *et al.;* exemplification of record Geo. T. Jackson, judgment, filed.

1888, Nov. 27.—Precipe for appearance of S. Schoyer, Jr., Esq., for defendants for whom W. M. Watson and Lyon & Shoemaker appear, filed.

1888, Nov. 30.—Exceptions on part of Melissa M. Shields to the master's report filed. Same day exceptions on part of Dora McAuley *et al.* to master's report filed.

1888, Dec. 18.—Argument had on exceptions to master's report, C. A. V.

1888, Dec. 24.—Opinion of the court filed on 1st, the
7 validity of the will of Mary McAuley; and, 2nd, on the exceptions to the master's report. Same day, petition of A. M. Byers for an order allowing him to sell real estate of decedent, Mary McAuley, on Duquesne way, Pittsburgh, Pa., presented and same day decree thereon directing Alexander M. Byers, administrator *c. t. a.*, to sell said real estate upon the terms and in the manner prayed; report to be made to the court for confirmation and the proceeds to be held subject to the decree of the court; petition and decree filed.

The following decree entered:

"And now, to wit, January 5th, 1889, this cause came on to be heard on bill, answers, replication, testimony, and report of the master, with exceptions thereto, and was argued by counsel; whereupon, upon consideration thereof by the court, it is ordered, adjudged, and decreed that the proceeds of the sale of the real estate that was of Mary McAuley, deceased, situated in Duquesne way, in the city of Pittsburgh, after deducting expenses attending the same, shall be distributed equally between the 'Home of the Friendless' and the 'Home for Aged Protestant Women.'"

And it is further ordered, adjudged, and decreed that the exceptions to the master's report be overruled and the said report confirmed, and that the personal estate of the said decedent be distributed among the thirteen first cousins of said decedent, to the exclusion of her second cousins, in conformity with said master's report, and that unless an appeal be duly entered from this decree within sixty days from this date the administrator is ordered to transfer
8 the stocks and pay out the cash of said decedent's personal estate in accordance with the schedule of distribution reported by the said master, adding the sum of nine dollars and sixty-one cents ($9.61) to the cash share of each of said thirteen distributees to cover the duplicate credit of one hundred and twenty-five dollars ($125) for *for* the examiner's fees inadvertantly allowed in said master's report by the court."

1889, Jan'y 17.—Proof of service of notice of application to fix bond on appeal filed.

1889, Jan'y 21.—Bond on appeal to U. S. Supreme Court of H. B. Shields, with Thos. J. Stevenson and E. M. Byers as sureties, in the sum of twenty-five thousand dollars, presented and bond approved. Same day petition for appeal of Henry B. Shields pre-

sented and appeal allowed by Hon. M. W. Acheson, J., and same filed.

1889, Feb'y 19.—Petition of A. M. Byers, adm'r, for an appeal to the U. S. Supreme Court presented in open court and prayer thereof granted and appeal allowed, and appellant's bond is fixed at $25,000.

1889, Feb'y 23.—Bond of A. M. Byers, with J. Kidd Fleming and E. M. Byers as sureties in the sum of $25,000, presented and same approved by the court and filed. Same day, upon stipulation of counsel, order granted allowing the examiner to file with his testimony an exemplification of the record of the orphans' court of Allegheny county, Penna., at No. 112, March term, 1887, and exemplication filed.

1889.—Petition of the administrator praying for instructions as to the disposition of the moneys in his hands pending the appeal presented, and said petition ordered to be filed and same filed. Same day proof of service of notice of above
9 petition filed.

1889, March 1.—The motion of the administrator for instructions as to the investment of the cash in his hands pending the appeal to the U. S. Supreme Court having come on to be heard, it is ordered that said fund to the extent of $5,000 be loaned to each one of the 13 first cousins upon their severally giving a bond, with sureties to be approved by the court, conditioned for the repayment thereof upon the final disposition of the cause by the said Supreme Court, with interest; filed.

1889, March 1.—Petition of H. B. Shields and Melissa M. Shields, his wife, in right of said Melissa M. Shields, praying for an appeal to the U. S. Supreme Court, presented, together with a bond in the sum of twenty-five thousand dollars, with E. M. Byers and Thos. J. Stevenson as sureties, and the prayer of the petition is granted and the bond approved. Petition and bond filed.

1889, March 13.—Petition of Dora McAuley, Rilla Wilson, and J. M. Wilson, her husband; Martha J. McGogney and William B. McGogney, her husband; Margaret P. Hugus and N. H. Hugus, her husband; Catharine Watson, Dr. William Watson, James M. Watson, W. Stewart Watson, Eliza Carr and J. R. Carr, her husband, praying for an appeal to the U. S. Supreme Court, together with a bond in the sum of $25,000, with E. M. Byers and Thomas J. Stevenson as sureties, presented and appeal allowed and bond approved and filed.

1889, March 19.—Death of defendant Margaretta M. Shear suggested, and, on motion, (counsel for administrator not objecting thereto), Samuel Macauley Jackson and Henry T. Jackson, ex'rs of said decedent, substituted as respondents herein.

10 1889, March 21.—Order granted overruling exceptions to bonds of executors of Margaretta M. Shear and of Robert F. McAuley and Susan Blakeley and same approved and directed to be filed and directing the adm'r *c. t. a.* of Mary McAuley, dec'd, to loan as a temporary investment to the said ex'rs of Margaretta M. Shears, dec'd, and Robert F. McAuley and Susan Blakeley the sum

of $5,000, each in accordance with the terms of the order of March 1, 1880. Order filed.

Also bond of Samuel Macauley Jackson and George T. Jackson, executors of Margaretta M. Shear, with Charles Robinson Smith, of New York city, as surety, in the sum of $10,000; Robert F. McAuley, with Amasa J. Parker and Amasa J. Parker, Jr., of Albany, N. Y., as sureties, in the sum of $10,000, and Susan Blakeley, with C. J. Dumond and Samuel M. Blakeley as sureties, in the sum of $10,000 to A. M. Byers, adm'r, etc.; filed.

1889, March 30.—Bonds of Martha Crawford, with John Fulton as surety; Ebenezer McBurney, with Joseph Shaw as surety; Samuel Thompson, with Samuel P. Fergus as surety; Catharine Gault, with Samuel P. Fergus as surety, and Eliza A. B. Monzingo, with Samuel P. Fergus as surety, in the sum of $10,000 each, with exceptions on behalf of the adm'r, presented to the court, and exceptions are overruled and bonds approved; and the adm'r *c. t. a.* of Mary McAuley, dec'd, is ordered as a temporary investment to loan to said Martha Crawford, Sarah Thompson, Catharine Gault, Eliza A. B. Monzingo, and Ebenezer McBurney the sum of $5,000 each, in accordance with the terms of the order of March 1, 1889.

Bonds and order filed.

1889, April 3.—Citations on appeal of H. B. Shields, A. M. Byers, adm'r of estate of Mary McAuley, deceased; H. B. Shields and Melissa M. Shields, his wife, in right of said Melissa M. Shields
11 and Dora McAuley *et al.*, returnable in the U. S. Supreme Court on the 2nd Monday of October next, issued and signed by Hon. M. W. Acheson, judge.

1889, April 8.—Service of citations accepted by all counsel of record for those for whom they appear.

12 *Bill in Equity.*

In the Circuit Court of the United States for the Western District of Pennsylvania, Sitting in Equity. No. 19. May Term, 1887.

To the honorable the judges of said court:

HENRY B. SHIELDS, a resident and a citizen of the State of Ohio, assignee of James McAuley, a resident and citizen of the State of Kansas, and Henry B. Shields in right of his wife, Melissa M. Shields, also a resident and a citizen of the State of Ohio, bring this their bill

against

ROBERT F. MCAULEY, MARY DOUGLASS, SUSAN BLAKELY, SARAH M. Hill, Robert F. M. Campbell, Mary Parker, Jane Stewart, all citizens of the State of New York; Rev. John McAuley, a citizen of the State of New Jersey and resident therein; Martha Jane McGoqney and William B. McGoqney, her husband; Margaret P. Hugus and N. H. Hugus, her husband; Catherine Watson, Dr. William Watson, Wilson Stewart Watson, James M. Watson, Julia Ash, Ebenezer McBurney, Kate Gault, Sarah Thompson, Martha Crawford,

Ebenezer McBurney, all citizens and residents of the State of Pennsylvania; William Parker, a resident and citizen of the State of Iowa; Eliza Paul, Rilla Willson and Dr. J. M. Wilson, her husband; Mary Montgomery and Dora McAuley, residents and citizens of the State of Illinois; Eliza A. Egbert and
13 Thomas McAuley, residents and citizens of the State of California; James Campbell, a resident and citizen of the State of Nebraska; Thomas M. Watson, a resident and citizen of the State of Alabama; Margaret Ann Payne, a resident and citizen of the State of Minnesota; Ann McCauslin, whose residence is to your orators unknown; none of whom are residents or citizens of the State of Ohio; Mrs. —— Zannings, a resident and citizen of the State of Iowa, heirs-at-law of Mary McAuley, late of the city of Pittsburgh, in the State of Pennsylvania, deceased, and Alexander M. Byers, administrator *cum testamento annexo* of the estate of said Mary McAuley, deceased, said Alexander M. Byers being a citizen of the State of Pennsylvania and residing in the city of Allegheny, in the county of Allegheny, in said State, and in the district aforesaid; "The Home of the Friendless," and the "Home for Protestant Destitute Women," both corporations of the State of Pennsylvania, operating within the western district thereof.

And thereupon your orators complain and say:

1st. That Mary McAuley, late of the county of Allegheny, in the western district of Pennsylvania, deceased, died on the sixth day of January, A. D. 1886, and until and at the time of her death was a citizen of the State of Pennsylvania aforesaid and resident within the western district thereof.

That said Mary McAuley died unmarried, without issue or lineal descendants, father or mother, brother or sister, uncle or aunt, nephew or niece, or any issue of nephew or niece, and leav-
14 ing to survive her as one of her heirs-at-law a first cousin, viz., James McAuley, a citizen of the State of Kansas, and now residing therein, who by writing, duly signed and sealed since the death of said Mary McAuley, assigned for value all his interest in all the estate, real, personal, and mixed, whereof said Mary McAuley died seized or possessed unto Henry B. Shields, one of your orators, who is a resident and citizen of the State of Ohio, and your said orator's interest in said estate greatly exceeds the sum of three thousand dollars over and above interest and costs. The said Mary McAuley left also to survive her the other one of your orators, to wit, Melissa M. Shields, who is also a resident and citizen of the State of Ohio, and also the parties defendants in this bill, whose names and residences and citizenship, so far as ascertained by your orators, are, as alleged in the stating part thereof, together with other persons, as yet to your orators unknown, none of whom are residents in or citizens of the State of Ohio.

2nd. That on the twelfth day of January, A. D. 1886, a writing purporting to be the last will and testament of said Mary McAuley, deceased, was offered for probate in said county of Allegheny by A.

M. Byers, one of the defendants to this bill, and was admitted by the register of wills of said county without notice to your orators, and upon a declaration by said A. M. Byers then made that said probate of said alleged will should be without prejudice to any of the rights of any of the parties interested in said estate, as your orators are informed and believe and aver to be true, and thereupon said register issued to said A. M. Byers letters of administration *cum testamento annexo* upon the estate of said decedent, who thereupon gave bond in the sum of four hundred thousand dollars and qualified as administrator aforesaid; but your orators aver and charge that said alleged probate was not in accordance with the laws of the State of Pennsylvania, and was not a legal probate of said will.

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3rd. Your orators aver that the paper purporting to be the last will and testament of said Mary McAuley, deceased (a copy of which alleged will is hereto attached, marked Exhibit No. 1) was not executed within the time required by the act of the General Assembly of the State of Pennsylvania, approved the 26th of April, A. D. 1855, entitled "An act relating to corporations and to estates held for corporate, religious, and charitable uses," and that therefore the bequests to the said defendants "The Home of the Friendless" and the "Home of Protestant Destitute Women," both of which are charitable institutions within the meaning of said act of assembly, have lapsed and become void, and said alleged will solely relating thereto is null and void.

4th. That the said Mary McAuley died seized of a large estate, partly realty and partly personalty, and the said A. M. Byers, administrator as aforesaid, has not proceeded in accordance with the laws of the State of Pennsylvania aforesaid in the administration of said personal estate, and has not filed within the register's office of said county of Allegheny a full and true account of any such administration, nor within the time required by said laws.

5th. That the real estate of said decedent is situate wholly within the said county of Allegheny, and yields a considerable income, the collection of which is not now attended to by any duly authorized person.

16

6th. That claiming the estate of said Mary McAuley, deceased, are two classes of claimants, viz., the first and the second cousins of said decedent; that your orator Henry B. Shields claims a first cousin's share as the assignee of James McAuley, a first cousin as aforesaid, and Melissa M. Shields aforesaid and your orator in right of said Melissa M. Shields are entitled to a second cousin's share in said estate, the said Melissa being a daughter of a deceased first cousin of said Mary McAuley, deceased, and that of the parties defendants in this bill some are first cousins and some are second cousins of said decedent.

That grave and difficult questions have arisen and will arise amongst the claimants to said estate in the settlement and distribution thereof.

Wherefore your orators need equitable relief and pray your honorable court as follows:

First. That the said alleged probate of said alleged will of said Mary McAuley, deceased, be declared void and of no effect.

Second. That the bequests in said alleged will be declared lapsed, and the said alleged will be declared null and void.

Third. That said A. M. Byers be enjoined and restrained by your honorable court from in any manner selling or disposing of
17 said real estate and from collecting the rents and profits thereof, and that your hon. court will appoint some suitable person to take hold of and manage said real estate until partition thereof can be duly had and to receive the profits thereof.

Fourth. That your honorable court will order, direct, and decree that a partition of said real estate be had and made to and among your orators and to the other parties in interest therein.

Fifth. That the said A. M. Byers be ordered and directed to make a full, just, and true account of all stock, money, and other assets of said estate that may have come into his hands, and that an account be taken of said testator's debts and funeral expenses, and that the surplus of said estate, after paying all the debts and expenses of said estate, be distributed to and among your orators and such other persons as may be found to be legally entitled thereto, and that until such final decree of your honors in this case for such distribution the said A. M. Byers be enjoined and restrained from paying out or distributing to any person any money or valuable thing belonging to said estate or in any manner disposing thereof.

Sixth. That your honors will grant such other and equitable relief as to your honors may seem meet and proper.

Seventh. That your honors will grant a writ of subpœna to be directed to all the above-named defendants, commanding
18 them and each of them, at a certain day and under a certain penalty, to be and appear before this court and then and there full, true, direct, and perfect answers make to all and singular the premises; and, further, to stand to, perform, and abide such further order, direction, and decree as to your honors shall seem meet.

And your orators will ever pray, &c.

HENRY B. SHIELDS.
HENRY B. SHIELDS,
In Right of Melissa M. Shields.

KNOX & REED,
Sol's pro Compl'ts.

STATE OF PENNSYLVANIA, } ss:
Western District, }

Personally before me came the above-named Henry B. Shields, who, being duly sworn according to law, says that the statements set forth in the foregoing bill of complaint, so far as they are stated on his own knowledge, are true and correct, and so far as they are stated on information received from others he believes them to be true.

HENRY B. SHIELDS.

Sworn and subscribed this 28th day of March, A. D. 1887, *coram*—
H. D. GAMBLE, *Clerk.*

EXHIBIT No. 1.

"By the request of my dear brother, my house on Duquesne way is to be sold at my death and the proceeds to be divided between the Home of the Friendless and the Home for Protestant Destitute Women.

(Signed) MARY McAULEY."

Filed March 28, 1887.

H. D. GAMBLE, *Clerk.*

19 *Chancery Subpœna.*

UNITED STATES OF AMERICA, }
Western District of Pennsylvania. }

The United States of America to Robert F. McAuley, Mary Douglass, Susan Blakely, Sarah M. Hill, Robert F. M. Campbell, Mary Parker, Jane Stewart, all citizens of the State of New York; Rev. John McAuley, a citizen of the State of New Jersey and resident th-rein; Martha Jane McGogney and William B. McGogney, her husband; Margaret P. Hugus and N. H. Hugus, her husband; Catherine Watson, Dr. William Watson, Wilson Stewart Watson, James M. Watson, Julia Ash, Ebenezer McBurney, Kate Gault, Sarah Thompson, Martha Crawford, Ebenezer McBurney, all citizens and residents of the State of Pennsylvania; William Parker, a resident and a citizen of the State of Iowa; Eliza Paul, Rilla Wilson and Dr. J. M. Wilson, her husband; Mary Montgomery and Dora McAuley, all residents and citizens of the State of Illinois; Eliza A. Egbert and Thomas McAuley, residents and citizens of the State of California; James Campbell, a resident and citizen of the State of Nebraska; Thomas M. Watson, a resident and citizen of the State of Alabama; Margaret Ann Payne, a resident and citizen of the State of Minnesota; Ann McCauslin, whose residence is unknown, none of whom are residents or citizens of the State of Ohio; Mrs. —— Jennings, a resident and citizen of the State of Iowa, heirs-at-law of Mary McAuley, late of the city of Pittsburgh, in the State of Pennsylvania, de-
20 ceased, and Alexander M. Byers, administrator *cum testamento annexo* of the estate of said Mary McAuley, deceased, said Alexander M. Byers being a citizen of the State of Pennsylvania and residing in the city of Allegheny, in the county of Allegheny, in said State, and in the district *of* aforesaid; "the Home of the Friendless" and the "Home for Protestant Destitute Women," both corporations of the State of Pennsylvania, operating within the western district thereof, Greeting:

We command you and every of you that you appear before our judge of our circuit court of the United States of America for the western district of Pennsylvania, at the city of Pittsburgh, in said

district, on the first Monday of May next, to answer the bill of complaint of Henry B. Shields, a resident and citizen of the State of Ohio, assignee of James McAuley, a resident and citizen of the State of Kansas, and Henry B. Shields in right of his wife, Melissa M. Shields, also a resident and citizen of the State of Ohio, filed in the clerk's office of said court, in the city of Pittsburgh, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default; and this you are in nowise to omit, under such penalties as are inflicted by the laws of the United States.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at the city of Pittsburgh aforesaid, this 28th day of March, in the year of our Lord one thousand eight hundred and eighty-seven and of
21 our Independence the one hundred and eleventh.

H. D. GAMBLE, *Clerk.*

MEMORANDUM.—The above-named defendants are required to enter an appearance in the above-entitled case on or before the first Monday of the month ensuing twenty days after the service of this writ; otherwise the complaint may be taken against them as confessed and a decree entered accordingly.

H. D. GAMBLE, *Clerk.*

March 28, 1887, served the within writ on A. M. Byers, adm'r *c. t. a.* of the estate of Mary McAuley, dec'd, personally by making known to him the contents thereof and by handing to him a true and attested copy of the same; and now, May 2, 1887, I certify that pursuant to directions of W. M. Watson, Esq., acting for att'ys for pl'ffs, the other def'ts were not served.

So ans.—

GEO. W. MILLER,
U. S. Marshall,
Per JOHN McGILL, *Dep'y.*

Marshal's fees, service and copy, $2.50.

22 *Precipe for Appearance.*

In the Circuit Court of the United States for the Western District of Pennsylvania.

HENRY B. SHIELDS, a Resident and a Citizen of the State of Ohio, Assignee of Jas. McAuley, a Resident and Citizen of the State of Kansas, and H. B. Shields, in Right of His Wife, M. M. Shields, also a Resident of the State of Ohio,
vs.
ROB'T T. MCAULEY and ALEXANDER M. BYERS, Administrator, *et al.*

No. 19. May Term, 1887. In Equity.

To H. D. Gamble, Esq., clerk U. S. cir. court:

Please enter my appearance for Alexander M. Byers, administrator in the above-entitled case.

D. T. WATSON,
Attorney for Alexander M. Byers, Administrator.

Filed May 4, 1887.

H. D. GAMBLE, *Clerk.*

23 *Plea of A. M. Byers, Administrator C. T. A.*

In the Circuit Court of the United States for the Western District of Pennsylvania. No. 19. May Term, 1887. In Equity.

HENRY B. SHIELDS, resident and citizen of the State of Ohio, assignee of James McAuley, a resident and citizen of the State of Kansas, and Henry B. Shields, in right of his wife, Melissa M. Shields, also a resident and citizen of the State of Ohio,

against

ROBERT T. MCAULEY, MARY DOUGLASS, SUSAN BLAKELY, SARAH M. Hill, Robert F. M. Campbell, Mary Parker, Jane Stewart, all citizens of the State of New York; Rev. John McAuley, a citizen of the State of New Jersey and resident therein; Martha Jane McGogney and William C. McGogney, her husband; Margaret P. Hugus and N. H. Hugus, her husband; Catherine Watson, Dr. William Watson, Wilson Stewart Watson, James M. Watson, Julia Ash, Ebenezer McBurney, Kate Gault, Sarah Thompson, Martha Crawford, Ebenezer McBurney, all citizens and residents of the State of Pennsylvania; William Parker, a citizen and resident of the State of Iowa; Eliza Paul, Rilla Wilson, and Dr. J. M. Wilson, her husband; Mary Montgomery, and Dora McAuley, all residents and citizens of the State of Illinois; Eliza A. Egbert and Thomas McAuley, residents and citizens of the State of California; James Campbell, a resident and citizen of the State of Nebraska; Thomas M. Watson, a resident and citizen
24 of the State of Alabama; Margaret Ann Payne, a resident and citizen of the State of Minnesota; Anne McCauslin,

whose residence is unknown, none of whom are residents or citizens of the State of Ohio; Mrs. —— Zanningo, a resident and citizen of the State of Iowa, heirs-at-law of Mary McAuley, late of the city of Pittsburgh, in the State of Pennsylvania, deceased, and Alexander M. Byers, administrator *cum testamento annexo* of the estate of Mary McAuley, deceased, said A. M. Byers being a citizen of the State of Pennsylvania; "The Home of the Friendless" and the "Home for Protestant Destitute Women," both corporations of the State of Pennsylvania, operating within the western district thereof.

The plea of Alexander M. Byers, administrator with the will annexed of all and singular the goods and chattels which were of Mary McAuley, deceased.

This defendant, by protestation, not confessing or acknowledging all or any of the matters or things in said complainants' bill of complaint mentioned and contained to be true in such manner and form as they are therein set forth and alleged, for plea to the said bill says—

That heretofore, to wit, on the 29th day of January, 1887, this respondent, as administrator of all and singular the goods and chattels which were of Mary McAuley, late of the county of Allegheny, in the State of Pennsylvania, deceased, as in and by the statutes of the said State in such case made and provided he was bound to do, filed his account of all and singular the said goods before the register in and for the said county of Allegheny, State of Pennsylvania, who had jurisdiction of the same, and thereupon the said
25 register passed upon said account and then and there, as provided by the statute, gave notice to all persons in interest by advertisement that the said register would present the said account on the 7th day of March, 1887, to the orphans' court of Allegheny county for examination and approval, the said court under the statutes of the State of Pennsylvania having exclusive jurisdiction thereof.

That the said account afterwards, to wit, on the 7th day of March, 1887, was presented to the said orphans' court of the said county of Allegheny, and was by said court confirmed and approved *nisi* and under the practice of the said court the said confirmation *nisi* became absolute unless exceptions thereto were filed within ten days' time from the confirmation of the said account *nisi*, to wit, on or before the 18th day of March, 1887.

That no exceptions were filed to the said account and on the 18th day of March, 1887, the confirmation thereof became absolute; that the said account showed upon its face the entire personal property of the decedent and all sums of money received by this administrator from the same, and also showed the entire expenditure of this respondent as administrator as aforesaid, leaving a balance in the hands of respondent as administrator for distribution amounting to a large sum, to wit, the sum of two hundred and twelve thousand two hundred and thirty-five and sixty-one one-hundredths

($212,235.61) dollars, the same being partly in cash and partly in personal property of the said decedent.

That afterwards, to wit, on the 21st day of March, 1887, the said account thus confirmed and approved was placed upon the
26 audit list of the said court for the purpose of hearing and distributing the balance shown by the said account to be in the hands of this respondent, as administrator, to and among such persons as are entitled thereto, and a day for the hearing thereof was fixed by the said court, to wit, on the 29th day of March, 1887, and that the orphans' court, under the laws of the State of Pennsylvania, had exclusive jurisdiction of the said hearing and distribution.

That said orphans' court had thus acquired jurisdiction of the accounts of your respondent and of the estate of the said Mary McAuley, deceased, and of the distribution of the balance shown to be in your respondent's hands as administrator and of the various matters and things involved in said account, a true copy of which account is hereto annexed and made part of this plea, and that the said jurisdiction was thus acquired prior to the filing of the bill of complaint in this court by the said complainants.

That the said orphans' court, by virtue of its jurisdiction as aforesaid, is proceeding to distribute the property of the said decedent in the hands of this respondent as administrator as aforesaid to and among such persons as shall be entitled thereto.

Wherefore this respondent does plead the said matters and things to the jurisdiction of this court and prays the judgment of this court whether he ought to make any further or other answer to the said bill of complaint.

ALEX. M. BYERS,
Administrator C. T. A.

27 UNITED STATES OF AMERICA, }
Western District of Penna. }

Personally before me came the above-named respondent, who, being by me duly sworn, says that the above plea is not filed for the purpose of delay and that the statements therein contained are true.

ALEX. M. BYERS.

Sworn and subscribed before me this 10th day of May, 1887.
[L. S.] L. H. MATTHEWS,
Notary Public.

The First and Partial Account of Alexander M. Byers, Administrator C. T. A. of the Estate of Mary McAuley, Dec'd.

Said accountant charges himself with the appraised value of all the items comprising said estate as shown in the inventory and appraisement filed February 8th, 1886, and also with the income derived therefrom to January 29, 1887, and also with gains on stocks and other effects of and belonging to the said estate sold over and above their appraised value, to wit:

1886.				
Feb'y	8th.	Net amount of inventory and appraisement filed		$220,585 83½
		Income:		
March	18.	Dividend from Mechanics' National bank	$297 50	
"	"	Dividend from Mechanics' National bank	297 50	
28				
Mar.	18.	Dividend from Citizens' Passenger Railway Company	625 00	
"	"	Dividend from Allegheny Bridge Company	437 50	
"	"	" " " " "	500 00	
"	"	Interest on promissory note for $5,000.00	325 00	
May	31.	Dividend from Citizens' Passenger Railway Company	625 00	
"	"	Dividend from Iron City National bank	1,148 00	
Nov.	20.	" " " "	1,148 00	
Dec.	13.	Dividend from Mechanics' National bank	297 50	
"	"	Dividend from Citizens' Passenger Railway Company	500 00	
"	"	Dividend from Allegheny Bridge Company	437 50	
"	"	Dividend from Pittsburgh Gas Company	330 00	
"	"	" " " "	330 00	
1887.				
Jan.	14.	" " " "	330 00	
				7,628 50
		Forward		$228,214 33½
29				
		Amount bro't forward		228,214 33½
1887.				
Jan.	14.	Dividend from Mechanics' National bank	$297 50	
"	"	Dividend from Allegheny Bridge Company	500 00	
"	29.	Interest on bank balance to this date, 2 % per annum	2,112 66	
"	"	Dividend, July, 1885, from Pittsburgh Gas Co.	330 00	
				3,249 16
		Gains:		
1886.				
May	1.	On jewelry sold as follows: One pair diamond earrings, sold for $75, appraised at $70	5 00	
		One cluster diamond pin, sold for $40.00, appraised at $35.00	5 00	
		One large solitaire diamond ring, sold for $35.00, appraised at $30	5 00	
Dec.	20.	On 72 shares Iron City National bank stock, sold at $85.00 per share; appraised value, $75.00 per share	720 00	735 00
				$232,189 49½
		The said accountant takes credit as follows: To payments made on account of said estate, to wit:		
1886.				
Jan.	6.	Obituary notices in the following newspapers:		
30				
		Penny Press, Dispatch, Commercial Gazette, Post, Times, Leader and Chronicle, and Telegraph, $1.50 each	$10 50	
Jan.	6.	Moving furniture at Monongahela house	3 00	
"	25.	Mrs. Mary Orr's bill of washing for deceased	2 00	
Feb.	9.	Andrew Fleming, M. D., professional services	10 00	
"	18.	H. P. Orr, M. D., professional services	15 00	

		Expenses incident to the decease and burial of Mis- Mary McAuley, as per Schedule "P," hereto attached	95 96	
Mar.	18.	H. Samson, undertaker's bill	579 00	
"	"	Notice of administration, Commercial Gazette	8 00	
		Forward	$723 46	
		Amount bro't forward	$723 46	$232,189 49½
Mar.	18.	Notice of administration, Chronicle-Telegraph	6 00	
"	"	George S. Griscom, room, &c., for deceased at the Monongahela house, Pittsburgh	228 16	
		Register's fees, $15, and swearing appraisers, $0.50	15 50	
Apr.	5.	Peter Dressler, coroner's fees	15 00	
31				
Apr.	6.	Collateral inheritance tax	9,855 71	
"	"	William McKibben, professional services	100 00	
June	5.	J. Rogers, M. D.	5 00	
Dec.	29.	H. Kleber & Bro., storage on piano	22 00	
1887.				
Jan.	27.	D. T. Watson, Esq., professional services	1,800 00	
		Accountant's commission, 5 %, on income derived from the estate to Jan. 29, 1887, $10,868.66	543 43	
		Accountant's commission on appraised value of the estate and gains over appraisement, $221,320.83	6,639 62½	
				19,953 88½
		Balance in hands of administrator as per Schedule "A," hereto attached		$212,235 61

STATE OF PENNSYLVANIA, }
Allegheny County. }

Personally before me came A. M. Byers, who, being by me duly sworn, says that the above account is correct and true.

ALEX. M. BYERS.

Sworn to and subscribed this 29th day of January, 1887, *coram*—
PHILIP HOERR, *Register.*

32 EXHIBIT "A."

Schedule of effects remaining in the hands of Alexander M. Byers, administrator *c. t. a.* of the estate of Mary McAuley, deceased, at the filing of his first and partial account as of date January 29th, 1887, to wit:

502 shares Iron City National Bank stock @ $75.00 per share, appraised value	$37,650 00
119 shares Mechanics' National Bank stock @ $80.00 per share, appraised value	9,520 00
250 shares Citizens' Passenger Railway Co. @ $83⅓ per share, appraised value	20,833 33
250 shares Allegheny Bridge Co. @ $50.00 per share, appraised value	12,500 00

220 shares Pittsburgh Gas Co. @ $40.00 per share, appraised value	8,800 00
Mortgage on real estate	5,000 00
One promissory note	10,000 00
One oil painting, landscape	8 00
" " " "	15 00
" " " masquerade	10 00
" " " cattle scene	10 00
Two bronze ornaments, $15.00 each	30 00
One small mirror	50
Photographic views and portrait	1 00
Unbound books and magazines	25
Two walking canes and one umbrella	1 00
One album, 25c.; one work-box, 25c.; one duster, 5c.; two vases and card receiver, 25c.	80
33 One powder-box, 10c.; one inkstand, 10c.; three match-boxes, 15c.; one marble weight, 5c.	40
Sixty volumes, bound and half-bound books	6 00
Two old trunks	1 00
Ladies' wearing apparel, consisting of clothes, bonnets, fans, shoes, and bed linen	150 00
Bed-room furniture, 2 tables, 4 chairs, 1 rocking chair, 1 lounge	50 00
One piano-forte	75 00
Forward	$104,662 28
Amount bro't forward	$104,662 28
A lot of tableware	50 00
One penknife, 25c.; tortoise-shell eyeglass, 25c.; two pocket-books and two pensers, 25c.	75
One razor, 5c.; three boxes trinkets, $5.00	5 05
One set jet gold trimmings, breastpin, two pieces earrings and cross	2 00
Two breastpins, pearl and amber	10
One gold watch and two chains	20 00
One pair gold spectacles and two pair gold eyeglasses	5 00
One gold thimble	2 00
One linen portfolio, one deposit Iron City Bank book, one mosaic pin, broken	1 00
One pocket-book, with memorandum of bequest; one set hair jewelry	1 00
One set common jewelry	1 00
One plain gold ring	90
One small solitaire diamond ring	10 00
One diamond ring, garnet centre of cluster	15 00
One diamond stud	25 00
Cash	107,434 53
	$212,235 61

34 EXHIBIT "P."

Expenses Incident to the Decease and Burial of Miss Mary McAuley.

Washing body of deceased and general attendance	$35 00
Flowers	18 25
Sitting in room with body of the deceased	25 00
Servants	13 00
Telegram to relatives announcing her decease	4 71
	95 96

Filed May 10, 1887.

H. D. GAMBLE, *Clerk.*

Decree Overruling Plea.

In the Circuit Court of the United States for the Western District of Pennsylvania, May Term, 1887. In Equity.

H. B. SHIELDS *et al.* *vs.* ROB'T F. MCAULEY *et al.* } No. 19.

Surplea of A. M. Byers, adm'r of estate of Mary McAuley, dec'd, to jurisdiction.

May 18, 1887, plea overruled.

34*a* *Precipe for Alias Subpœna.*

In the Circuit Court of the United States for the Western District of Pennsylvania, May Term, 1887. In Equity.

HENRY M. SHIELDS, Assignee, &c., *et al.* *vs.* ROB'T F. MCAULEY *et al.* } No. 19.

To H. D. Gamble, Esq., clerk of said court:

Issue an alias subpœna in the above-entitled case directed to all the respondents not served heretofore, returnable to next return day.

KNOX & REED,
Sol's for Complainants.

Filed June 8, 1887.

H. D. GAMBLE, *Clerk.*

Alias Chancery Subpœna.

UNITED STATES OF AMERICA,
Western District of Pennsylvania.

The United States of America to Robert F. McAuley, Mary Douglass, Susan Blakely, Sarah M. Hill, Robert F. M. Campbell, Mary Parker, James Stewart, all citizens of the State of New York; Rev. John McAuley, a citizen of the State of New Jersey and
34*b* resident therein; Martha Jane McGogney and William B. McGogney, her husband; Margaret P. Hugus and N. H. Hugus, her husband; Catharine Watson, Dr. William Watson, Wilson Stuart Watson, Julia Ash, Ebenezer McBurney, Kate Gault, Sarah Thompson, Martha Crawford, Ebenezer McBurney, all citizens and residents of the State of Pennsylvania; William Parker, a resident and citizen of the State of Iowa; Eliza Paul, Rilla Wilson and Dr. J. M. Wilson, her husband; Mary Montgomery and Dora McAuley, all residents and citizens of the State of Illinois; Eliza A. Egbert and Thomas McAuley, residents and citizens of the State of California; James Campbell, a resident and citizen of the State of Nebraska; Thomas M. Watson, a resident and citizen of the State of Alabama; Margaret Ann Payne, a resident and citizen of the State of Minnesota; Ann McCauslin, whose residence is unknown; none of whom are residents or citizens of the State of Ohio; Mrs. —— Zanningo, a resident and citizen of the State of Iowa; h*eris*-at-law of Mary McAuley, late of the city of Pittsburgh, in the State of Pennsylvania, deceased, and Alexander M. Byers, administrator *cum testamento annexo* of the estate of said Mary McAuley, deceased, said Alexander M. Byers being a citizen of the State of Pennsylvania and residing in the city of Allegheny, in the county of Allegheny, in said State, and in the district aforesaid; "The Home of the Friendless" and "The Home for Protestant Destitute Women," both corporations of the State of Pennsylvania operating within the western district thereof, Greeting:

We command you and every of you that you appear before
34*c* the judges of our circuit court of the United States of America for the western district of Pennsylvania, at the city of Pittsburgh, in said district, on the first Monday of July next, to answer the bill of complaint of Henry B. Shields, a resident and citizen of the State of Ohio, assignee of James McAuley, a resident and citizen of the State of Kansas, and Henry B. Shields in right of his wife, Melissa M. Shields, also a resident and citizen of the State of Ohio, filed in the clerk's office of said court in the city of Pittsburgh, then and there to receive and abide by such judgment and decree as shall then or thereafter be made upon pain of judgment being pronounced against you by default; and this you are in nowise to omit, under such penalties as are inflicted by the laws of the United States.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at the city of Pittsburgh aforesaid, this 8th day of June, A. D. 1887, and of our Independence the one hundred and eleventh.

[L. S.] H. D. GAMBLE, *Clerk.*

MEMORANDUM.—The above-named defendants are required to enter an appearance in the above-entitled cause on or before the first Monday of the month ensuing twenty days after the service of this writ; otherwise the complaint may be taken against them as confessed and a decree entered accordingly.

H. D. GAMBLE, *Clerk.*

34*d* And now, June 9, 1887, service accepted for Dr. Wm. Watson, Wilson S. Watson, Mrs. Rilla Wilson, Dr. J. M. Wilson, Dora McAuley, Thomas M. Watson, Martha Jane McGogney, William B. McGogney, Margaret P. Hugus, N. H. Hugus, Catharine Watson, Ebenezer McBurney, Ebenezer McBurney (sued as Ebenezer McBurney), Sarah Thompson, Catharine Gault (sued as Kate Gault), Eliza M. Monzingo (sued as Mrs. Zanningo), and Martha Crawford, by their respective attorneys, as per endorsements made on this writ.

June 11, 1887.—Served the within writ of subpœna on "The Home of the Friendless," a defendant party herein named, by giving a true and attested copy of the same to Mrs. R. McKnight, president of the board of managers, personally, and making known to her the contents hereof; as to the other defendants named and "The Home for Protestant Destitute Women," "*non est.*"

So ans.—

GEO. W. MILLER,
U. S. Marshal,
Per W. B. CHAMBERS, *Dep'y.*

Services, 18 @ $2.00	$36 00
Copies, 3 @ .50	1 50
Mileage, 3 @ 6c.	18
	$37 68

June 9, 1887.—Service of within subpœna accepted for Dr. Wm. Watson, Wilson T. Watson, Mrs. Rilla Wilson, Dr. J. M. Wilson, Dora McAuley, Thomas M. Watson, Martha Jane McGogney, and Wm. B. McGogney, Margaret P. Hugus, and N. H. Hugus, and Catharine Watson.

WM. M. WATSON,
Att'y for Above Respondents.

June 9, 1887.—Service of the within chancery subpœna accepted for the following defendants, to wit: Ebenezer McBurney,
34*e* Ebenezer M. McBurney (sued as Ebenezer McBurney), Sarah

Thompson, Catharine Gault (sued as Kate Gault), Eliza M. Monzingo (sued as Mrs. Zanningo), and Martha Crawford.

D. F. PATTERSON, 96 Diamond St., Pittsburgh, Pa.
JOHN W. DONNAN, Washington, Penna.
JAMES M. McBURNEY, " "
Att'ys for said Defendants.

Agreement as to Plea.

In the Circuit Court of the United States for the Western District of Pennsylvania.

HENRY B. SHIELDS *et al.*
vs.
ALEXANDER M. BYERS, Administrator *c. t. a., et al.*
No. 19. May Term, 1887. In Equity.

And now, May 17th, 1887, with the leave of court, the parties hereto agree that the plea in this case, filed on the 10th day of May, 1887, shall be set down for a hearing and argument on the merits of the same.

If the subject-matter set forth in the plea is a bar to the jurisdiction of the circuit court in the distribution of the balance shown by the account of the said administration, which is annexed to and made part of the said plea, that then the said plea should be sustained and that it shall not be overruled, because it is not a plea to the whole of the said bill nor to the jurisdiction of the said
34*f* circuit court as to other matters and things alleged in the said bill of complaint in this case filed.

D. T. WATSON,
Att'y A. M. Byers, Adm'r.
KNOX & REED,
Att'ys for Plaintiffs.

And now, Jun- 27, 1887, within agreement ordered to be filed *nunc pro tunc* as of May 17, 1887, by leave of court.

H. D. GAMBLE, *Clerk.*

Answer of A. M. Byers, Administrator.

In the Circuit Court of the United States for the Western District of Pennsylvania, May Term, 1887.

HENRY B. SHIELDS *et al.*
vs.
ALEXANDER M. BYERS, Administrator *c. t. a., et al.*
No. 19.

This respondent, saving and reserving unto himself any and all manner of objections to the manifold inaccuracies and errors in plaintiffs' bill of complaint contained, for answer thereunto says:

1st. I admit the averments in the first paragraph of the bill, except that I have no personal knowledge of the assignment alleged

in said paragraph from James McAuley to Henry B. Shields,
34*g* and, as far as the said assignment is material, I ask that plaintiff be put upon proof of the same.

2nd. It is true that on the 12th day of January, 1886, a writing, purporting to be the last will and testament of Mary McAuley, deceased, was offered for probate before the register of wills in and for the county of Allegheny by this respondent and was admitted by the register of wills of the said county to probate, in accordance with the practice in such cases had in the State of Pennsylvania, without notice to the plaintiffs in said bill; but respondent denies that the said will was admitted to probate by the declaration of your respondent that it should be admitted to probate without prejudice to any of the parties in interest; and it is true that the register of wills in and for the county of Allegheny did thereupon issue to your respondent letters of administration *cum testamento annexo* upon the estate of the said decedent, and that respondent thereupon gave bonds in the sum of $400,000, with good sureties, as administrator as aforesaid. Respondent denies the averments in the second paragraph of the bill "that the said alleged probate was not in accordance with the laws of the State of Pennsylvania and was not a legal probate of the said will."

3rd. Respondent denies the averments in the third paragraph of the bill and says that the said will is not void for any of the reasons or matters and things therein set forth, but, on the contrary thereof, it is a valid will.

4th. I admit the averments in the fourth paragraph of the bill that Mary McAuley died seized and possessed of a large estate, partly real and partly personalty, but I deny all the other
34*h* averments in said paragraph to the effect that I have not proceeded in accordance with the laws of the State of Pennsylvania in the administration of the said personal estate, or that I have not filed in the register's office of the county of Allegheny a full and true account of said administration within the time required by the said laws, and I aver, on the contrary, that heretofore, to wit, on the 29th day of January, 1887, this respondent filed his account of all and singular the personalty which was of Mary McAuley, deceased, at and before her death, before the register of wills in and for the county of Allegheny, in the State of Pennsylvania, who then and there had jurisdiction of the same, and that thereupon the said register passed upon said account and approved the same, and then and there, as provided by the statute, the said register gave notice to all persons in interest, by advertisement, that the said register would present the said account of your respondent, on the 7th day of March, 1887, to the orphans' court of Allegheny county for examination and approval, the said court, under the statutes of the State of Pennsylvania, having exclusive jurisdiction thereof.

That the said account afterwards, to wit, on the 7th day of March, 1887, was presented by said register to the orphans' court of the said county and was by said court confirmed and approved *nisi*, and under the practice of the said court the said confirmation *nisi* became absolute unless exceptions thereto were filed within ten days from said

confirmation *nisi*, to wit, on or before the 18th day of March, 1887.

That no exceptions were filed on the said account, and on the 18th day of March, 1887, the confirmation *nisi* became and was absolute.

34*i* And the said respondent says that the said order and decree in the said orphans' court approving and confirming the said account absolutely was made long prior to the filing of the bill in this case, and is therefore conclusive upon the said complainants and all parties to this suit.

5th. I admit that the real estate of the said decedent is situate wholly within the county of Allegheny and yields a considerable income, but I deny that the collection of the said income is not now attended to by any duly authorized person; but, on the contrary thereof, I say that as administrator with the will annexed I am authorized to collect and receive the said rents.

6th. I admit the averments in the sixth paragraph of the bill, but I say that long prior to the filing of the bill in this case the orphans' court of the county of Allegheny had acquired jurisdiction of the account of this respondent as administrator *cum testamento annexo* of the said Mary McAuley deceased, and had on the 18th day of March, 1887, finally approved and confirmed an account which your respondent theretofore had rendered of all and singular the matters and things involved in the personal estate of the said Mary McAuley, deceased, set forth or referred to in the bill of complaint in this case.

That the said orphans' court also then and there had and did acquire jurisdiction of the distribution of the balance shown by the said account to be in the hands of this administrator as aforesaid, and that by reason thereof respondent respectfully submits that this court has no jurisdiction of the matters and things charged

34*j* in the bill in this case in so far as the personal estate of the said Mary McAuley, deceased, is concerned.

Wherefore, having fully answered the averments in the bill of complaint contained, this respondent prays to be hence dismissed with his reasonable costs in this behalf most wrongfully sustained.

ALEX. M. BYERS,
Administrator C. T. A.

STATE OF PENNSYLVANIA, } ss:
County of Allegheny, }

Personally before me came the above-named Alexander M. Byers, who, being by me duly sworn according to law, says that the statements contained in the foregoing answer, so far as made from his own knowledge, are true, and so far as made from information received he believes them to be true.

ALEX. M. BYERS.

Sworn and subscribed before me this 28th day of June, A. D. 1887.

[L. S.]

L. H. MATHEWS,
Notary Public.

Filed June 29, 1887.

H. D. GAMBLE, *Clerk.*

35 *Præcipe for Appearance.*

In the U. S. Circuit Court for the Western District of Pennsylvania, May T., 1887. In Equity.

H. B. SHIELDS, Assignee, &c., *vs.* DORA MCAULEY *et al.* } No. 19.

Please enter my appearance in above case for Thomas M. Watson, Dr. William Watson, James M. Watson, Martha Jane McGogney and Wm. B. McGogney, Margaret P. Hugus and N. H. Hugus, Catharine Watson, Wilson Stewart Watson, Dora McAuley, Rilla Wilson, and J. M. Wilson.

WM. M. WATSON.

To H. D. Gamble, Esq., clerk. July 16, 1887.

Filed July 16, 1887.

H. D. GAMBLE, *Clerk.*

Præ. for Appearance.

May Term, 1887. In Equity. U. S. C. C., W. D. of Pa.

SHIELDS *et al.* *vs.* MCAULEY *et al.* } No. 19.

H. D. Gamble, Esq., clerk:

Please enter our appearance in above case for Mary Montgomery, Joseph A. Montgomery, Margaret Ann Payne, Dexter C. Payne, Eliza Paul, Eli Paul, Mary Parker, Jane Stewart, John A. Stewart, Wm. M. Parker, Sarah Hill, and Rob't F. Campbell.

July 16, 1887.

LYON & SHOEMAKER.

Filed July 16, 1887.

H. D. GAMBLE, *Clerk.*

36 *Answer of Certain Respondents and Order of Court.*

In the Circuit Court of the United States for the Western District of Pennsylvania, May Term, 1887. In Equity.

HENRY B. SHIELDS, Assignee, and HENRY M. SHIELDS and MELISSA M. SHIELDS, His Wife, in Right of Melissa M. Shields, *vs.* ROBERTS F. MCAULEY, A. M. BYERS, Administrator *c. t. a.* of Mary McAuley, Deceased, *et al.* } No. 19.

To the honorable the judge of the said court:

The joint and several answer of Mary Montgomery and Joseph A. Montgomery, her husband; Margaret Ann Payne and Dexter C.

Payne, her husband; Eliza Paul and Eli Paul, her husband; Mary Parker, spinster; Jane Stewart and John A. Stewart, her husband; William M. Parker, Sarah Hill, Robert F. Campbell, Rilla Wilson and J. M. Wilson, her husband; Dora McAuley, and Thomas M. Watson, of respondents to the bill of said named plaintiff, for answer thereto saith:

We admit all the allegations in the several paragraphs of said bill contained, and join in the several prayers of said bill, and further we pray that your honorable court will make an order directing that we, the above-named respondents, be now made and constituted plaintiffs in said bill in equity along with Henry B. Shields, assignee, and Henry B. Shields and Melissa M. Shields in her right, the present plaintiffs.

MARY MONTGOMERY,
JOSEPH A. MONTGOMERY,
MARGARET ANN PAYNE,
DEXTER C. PAYNE,
ELIZA PAUL,
ELI PAUL,
MARY PARKER,
JANE STEWART,
37 JOHN A. STEWART,
WM. PARKER,
SAMUEL HILL,
ROBERT F. CAMPBELL,
By their solicitors, LYON & SHOEMAKER.
RILLA WILSON AND
DR. J. M. WILSON,
DORA MCAULEY,
MARTHA JANE MCGOGNEY AND
WILLIAM B. MCGOGNEY,
MARGARET P. HUGUS AND
N. H. HUGUS,
CATHARINE WATSON,
DR. WILLIAM WATSON,
JAMES M. WATSON,
WILSON STEWART WATSON AND
THOMAS M. WATSON,
By their solicitor, WM. M. WATSON.

And now, to wit, July 16, 1887, the within answer presented and read in open court, and thereupon, upon motion of Lyon & Shoemaker and Wm. M. Watson, solicitors for respondents, respectively *or* within named, and due notice of said motion having been served upon solicitors for the plaintiff-, the court do now order and direct that the said named respondents be, and they are hereby, made and constituted plaintiffs in this proceeding along with the said Henry B. Shields, assignee, and Henry B. Shields and Melissa M. Shields in her right, the present plaintiff-, and the record is amended accordingly.

And now, to wit, July 16, 1887, rule to show cause granted, returnable after ten days' notice.

BY THE COURT.

Dec. 24, 1888, this rule discharged.

BY THE COURT.

Filed July 16, 1887.

H. D. GAMBLE, *Clerk.*

38 *Notice of Applying to Court for Order and Acceptance of Service.*

U. S. Circuit Court, W. D. of Pa., May Term, 1887. In Equity.

H. M. SHIELDS, Assignee, and H. M. SHIELDS *et al.*
vs.
A. M. BYERS, Adm'r of Miss Mary McAuley, Deceased, *et al.* } No. 19.

Please take notice that on Saturday, July 16, 1887, at ten o'clock a. m., we shall present to the court the answer of our clients to the bill in this case and ask the court to make an order making and constituting our clients plaintiffs in said bill.

LYON & SHOEMAKER,
Attorneys for Eliza Paul et al., Now of Respondents.
WM. M. WATSON,
Attorney for Dora McAuley et al., Now of Respondents.

To Mess. Knox & Reed, sol's for pl'ff-.
Pittsburgh, July 15, 1887.

July 15, 1887, service of above accepted.

KNOX & REED,
Sol's for Def'ts.

Filed July 16, 1887.

H. D. GAMBLE, *Clerk.*

39 *Answer of Ebenezer McBurney et al.*

In the Circuit Court of the United States for the Western District of Pennsylvania, May Term, 1887. In Equity.

HENRY B. SHIELDS *et al.*
vs.
ROBERT MCAULEY *et al.* } No. 19.

The answer of Ebenezer M. McBurney (sued as Ebenezer McBurney), Ebenezer McBurney, Sarah Thompson, Catharine Gualt (sued as Kate Gualt), Eliza Monzingo (sued as Mrs. Zamingo), and Martha Crawford, six of the defendants, to the bill of complaint of Henry B. Shields, complainant.

The defendants, now and at all times hereafter saving and reserving to themselves all and all manner of benefits and advantages of exception which can or may be had or taken to the mani-

fold errors, uncertainties, and insufficienc-es of said bill of complaint, for answer unto said bill or to so much and to such parts thereof as they are advised it is material or necessary for them to make answer unto, answering, say :

It is true, as averred in complainants' bill, that Mary McAuley died on the sixth day of January, A. D. 1886, and that until
40 and at the time of her death she was a citizen of the State of Pennsylvania, resident within the western district thereof, and that she died unmarried, without issue or lineal descendants, father or mother, brother or sister, uncle or aunt, nephew or niece, or any issue of nephew or niece, and leaving to survive her as one of her heirs-at-law a first cousin named James McAuley, a citizen of the State of Kansas and now residing therein.

These respondents, further answering, say that they are not informed otherwise than by the said bill whether it is true or not, as therein averred, that the said James McAuley assigned his interest in said decedent's estate in manner as averred in said bill, and they leave complainants to make such proof of said assignment as they may be advised to be necessary ; but these respondents admit that the interest that was or is of said James McAuley in said estate exceeds the sum of three thousand dollars ; and they further admit that said decedent left to survive her the complainant Melissa M. Shields and the parties named as defendants in said bill of complaint, but they deny here, and more particularly hereinafter, that said Melissa M. Shields has any interest in the distribution of said decedent's estate.

These respondents, further answering, admit that on the twelfth day of January, A. D. 1886, a writing purporting to be the last will and testament of said decedent was offered for probate in the county of Allegheny by A. M. Byers, one of the defendants herein, and admitted by the register of wills of said county without notice
41 of complainants, but they are not informed and cannot answer whether or not it was so admitted upon the declaration of said Byers that said probate should be without prejudice to the rights of any of the parties interested in said decedent's estate ; they further admit that said register issued to said Byers letters of administration *cum testamento annexo* upon the estate of said decedent, and that said Byers gave bond in the sum of four hundred thousand dollars and qualified as such administrator, but they deny that said probate was illegal and not in accordance with the laws of the State of Pennsylvania.

These respondents, further answering, admit that the writing purporting to be the last will and testament of said decedent (a copy of which is attached to complainants' bill) was not executed within the time required by the act of 26th April, 1885, referred to in said bill, and that the legacies to " The Home of the Friendless " and to the " Home of Protestant Destitute Women " have lapsed and become void ; but these respondents deny that said will is null and void, and they aver that said will is valid and was properly admitted to probate, and that it worked a conversion of the real estate mentioned therein.

The respondents, further answering, admit that said decedent died seized of the real estate mentioned in said will, but of no other real estate, and that she died possessed of a large personal estate; but they have no personal knowledge upon which to base either admission or denial of the averments that said administrator has not proceeded in accordance with the laws of the State of Pennsyl-
42 vania in the administration of said personal estate, and that he has not filed a full and true account of such administration.

It is true to the knowledge of these respondents that said administrator has not sold certain stocks and other articles of personal property belonging to said decedent's estate, but these respondents aver that they and all the first cousins of said decedent who survived her, except the defendant Julia Ash, including the said James McAuley, alleged assignor of the complainant Henry B. Shields, prior to his alleged assignment, requested said administrator not to sell said stocks and unsold articles of personal property.

These respondents, further answering, admit that the real estate of said decedent (which they aver consists wholly of the property mentioned in the aforesaid will) is situate wholly within the said county of Allegheny, and that it yield- a considerable income, the collection of which is not now attended to by any duly authorized person to the knowledge of these respondents.

These respondents, further answering, admit that two classes of claimants, to wit, the first and the second cousins of said decedent, are claiming the right to share in the distribution of said decedent's estate, and that James McAuley is a first cousin and Melissa M. Shields is a daughter of a deceased first cousin of said decedent, and that some of the defendants (including all of these respondents) are first cousins and some are second cousins of said decedent.

These respondents, further answering, say that the de-
43 cedent's father was John McAuley and her mother was Mary McBurney, lawfully intermarried with said John McAuley; that said John McAuley had three brothers of the full blood and one brother of the half blood, all paternal uncles of said decedent and none of whom were living at the date of her decease, but each of whom left one or more children who survived said decedent and are her first cousins, to wit:

Rev. John McAuley, only son of Rev. Thomas McAuley, who was a brother of decedent's father.

Margaret Shears, only daughter of Dr. Samuel McAuley, who was a brother of decedent's father.

Robert F. McAuley and Susan Blakely, only son and daughter of Rev. William McAuley, who was a brother of decedent's father.

Duncan T. McAuley and James McAuley (assignor of complainant), who are sons of Rev. James McAuley, who was a half brother of said decedent's father.

That said Mary McBurney McAuley, mother of said decedent, had three brothers, to wit, Alexander, Joseph, and James, and two sisters, to wit, Jane Gillespie and Martha Mathews, being maternal uncles and aunts of said decedent, none of whom were living at the

date of her decease and one of whom, to wit, Joseph McBurney, died without issue. Of the other maternal uncles and aunts of the decedent Alexander McBurney left two children, who survived said decedent, being her first cousins, to wit, Ebenezer M. McBurney and Julia Ash, and he had five other sons and daughters, all of whom died prior to the death of the decedent, one of whom, Thomas
44 McBurney, died without issue and four of whom left children, being second cousins of said decedent, who survived her.

James McBurney, brother of said decedent's mother, left three children, who survived said decedent, being her first cousin, to wit, Ebenezer McBurney, Sarah Thompson, and Catharine Gualt, and he had four other children, all of whom died prior to the death of the decedent, but one of whom, James McBurney, died without issue, and three of whom left children, being second cousins of said decedent, who survived her.

Jane Gillespie, sister of said decedent's mother, left one child, who survived said decedent, being her first cousin, to wit, Eliza Monzingo, and she had three other children, all of whom died prior to the death of said decedent, all of whom left children, being second cousins of said decedent, who survived her.

Martha Mathews, sister of said decedent's mother, left one child, who survived said decedent, being her first cousin, to wit, Martha Crawford, and she had two other children, both of whom died prior to the death of the decedent, but both of whom left children, being second cousins of said decedent, who survived her.

That then thirteen first cousins herein mentioned were the nearest kindred of said decedent living at the date of her decease, and all of her other kindred then living were of a more remote degree, and all were lineal descendants of the paternal and maternal uncles and aunts of the said decedent.

These respondents, further answering, deny that any grave and difficult questions have arisen or can arise amongst
45 the claimants to said estate in the settlement and distribution thereof; on the contrary, they aver that under the intestate laws of the State of Pennsylvania, as construed by the supreme court of said State, the first cousins of said decedent living at the date of her decease are entitled to the proceeds of her estate, real and personal, in equal shares, to the exclusion of all other kindred; that her entire estate was acquired from her deceased brother and sister; that her personal estate, of which she died intestate, consists of cash, of securities, and stocks readily convertible into cash, or distributable without conversion, and of some articles of personal property of little intrinsic value, which said first cousins prefer to have distributed without conversion; that the only real estate of which the decedent died seized is a house and lot of ground situate on Duquesne way, in the city of Pittsburgh, in the said county of Allegheny, which was converted by virtue of the direction for sale contained in the aforesaid will, and which may be sold under the order of this honorable court or of the orphans' court of the said county of Allegheny, and the proceeds of such sale divided

in equal shares amongst the aforesaid first cousins of said decedent.

These respondents, thus answering, respectfully crave leave to join in the fifth and sixth prayers of the complainants' bill, except in so far as the fifth prayer prays for the distribution of any
46 share of said decedent's estate to the complainant in right of his wife, Melissa M. Shields.

D. F. PATTERSON,
JOHN W. DONNAN,
JAMES M. McBURNEY,
Solicitors for Respondents.

WESTERN DISTRICT OF PENNSYLVANIA, } ss:
Washington County, }

Personally before me came Ebenezer M. McBurney, one of the respondents named in the foregoing answer, who, being dul*t* qualified according to law, says on behalf of himself and his corespondents that the facts contained in the said answer so far as the same are stated of his own knowledge are true and so far as stated upon information received he believes them to be true.

E. McBURNEY.

Sworn to and subscribed this 29th day of August, A. D. 1887, before me—

S. C. CLARK, [SEAL.]
U. S. Commissioner.

Filed Sept. 2, 1887.

H. D. GAMBLE, *Clerk.*

47 *Demurrer of the "Home of the Friendless."*

In the Circuit Court of the United States for the Western District of Penna.

HENRY M. SHIELDS, Assignee, &c., *et al.*
vs.
ROBERT F. McAULEY *et al.* and "THE Home of the Friendless," a Corporation of the State of Pennsylvania. } No. 19. May Term, 1887.

To the honorabie the judges of the said court:

The demurrer of the said "The Home of the Friendless for Pittsburgh and Allegheny," a corporation by and under the laws of Pennsylvania, defendant, to the bill of complaint of Henry M. Shields, a resident and citizen of the State of Ohio, assignee, &c., and Henry B. Shields, in right of his wife, Melissa M. Shields, also a citizen and resident of the State of Ohio, respectfully sets forth as follows:

That this defendant, by protestation and not confessing or acknowledging all or any of the matters and things in said com-

plain-ts' bill to be true in such manner and form as the same are therein set forth and alleged, doth demur to so much of said bill as seeks that this defendant may answer and prays for the cancellation and declaring void of the will of Mary McCauley and the probate thereof, and for cause of demurrer showeth:

That the said complainants by their said bill, as this defendant is advised, ask and pray for the cancellation and avoiding of a will which has been duly admitted to probate in the register's court of the county where the testator was domiciled and where the
48 real estate, the subject of the devise of said will, is situated, as by reference to the said bill of complaint will more fully appear, whereby, as defendant is informed and believes, the judgment of a court of competent jurisdiction is sought to be attacked and impeached in a collateral proceeding.

Wherefore and for divers other errors and imperfections appearing in the said bill this defendant prays the judgment of this honorable court whether it shall be compelled to make any answer to the said bill so as aforesaid demurred to, and prays to be hence dismissed with its reasonable costs in this behalf sustained.

THOS. PATTERSON,
Att'y for "The Home of the Friendless."

ALLEGHENY COUNTY, *ss:*

Mrs. E. D. McKnight, president of "The Home of the Friendless of Pittsburgh and Allegheny," being duly sworn, says that the above demurrer is not interposed for delay.

E. D. McKNIGHT,
Pres't Home for the Friendless.

Sworn and subscribed this 8th day of September, A. D. 1887.
[L. S.] C. C. LEE,
Notary Public.

I, Thomas Patterson, counsel for the "Home of the Friendless of Pittsburgh and Allegheny," do hereby certify that in my opinion the within demurrer is well founded in point of law.

Pittsburgh, Sept. 6th, 1887.

THOS. PATTERSON.

Filed Sept. 8, 1887.

H. D. GAMBLE, *Clerk.*

49 *Motion of Ebenezer M. McBurney and Other Respondents to Dismiss Suit.*

In the Circuit Court of the United States for the Western District of Pennsylvania.

HENRY B. SHIELDS *et al.*
vs.
ROBERT MCAULEY *et al.* } No. 19. May Term, 1887. In Equity.

And now, to wit, October 19th, 1887, comes Ebenezer M. McBurney, Sarah Thompson, Catharine Gault, Ebenezer McBurney, Eliza Monzingo, and Martha Crawford, respondents in above case, whose answer was filed on September 2nd, 1887, by their solicitors, D. F. Patterson, John W. Donnan, and J. M. McBurney, Esqs.; to which answer no exceptions have been filed and no replication thereto has been filed nor any proceedings thereon taken by complainants, and moves the court to enter an order for the dismissal of the above-stated suit.

D. F. PATTERSON,
JOHN W. DONNAN,
J. M. McBURNEY,
Solicitors for Above-Named Respondents.

And now, to wit, Oct. 19th, 1887, the within motion is directed to be filed, and Saturday, Oct. 22, 1887, at 10.00 a. m., is fixed for hearing thereof; notice of this order to be given forthwith to the plaintiffs' counsel.

BY THE COURT.

Filed Oct. 19, 1887.

H. D. GAMBLE, *Clerk.*

50 *Answer of the "Home of the Friendless."*

In the Circuit Court of the United States for the Western District of Pennsylvania.

HENRY B. SHIELDS *et al.*
vs.
ALEXANDER M. BYERS, Administrator *c. t. a., et al.*, and "The Home of the Friendless of Pittsburgh and Allegheny." } No. 19. May Term, 1887.

To the honorable the judges of the circuit court of the United States:

The answer of the Home of the Friendless of Pittsburgh and Allegheny, a corporation under the laws of the State of Pennsylvania, saving and reserving unto itself all manner of objections to the inaccuracies and errors in plaintiffs' bill, as well — those heretofore

exhibited in a special demurrer filed by this respondent as others appearing on the face of said bill, respectfully showeth:

1st. That the averments of the first paragraph of plaintiffs' bill relate to matters which are without the knowledge of your respondent, and so far as same are material or relevant to this controversy respondent asks that plaintiff may be put upon proof thereof.

2nd. As to the second paragraph of said bill, your respondent saith that it is true that the said last will and testament of Mary McAuley was admitted to probate by the register of wills of
51 Allegheny county; but your respondent is informed and believes that it is not true that said A. M. Byers, administrator, &c., made any declaration to the effect that said probate should be without prejudice to the rights of the parties or any declaration of a similar nature. Your respondent further saith in answer to said paragraph that the said will was admitted to probate in due course of law, upon proof satisfactory to the register of wills of said county, and that under the laws of the State of Pennsylvania the act of the said register in admitting the will to probate was a judicial act and decree binding upon all parties unless appealed from in manner provided by law, and that same cannot be impeached or attacked in any collateral proceeding whatever.

3rd. Respondent, in answer to the allegations of the third paragraph of plaintiffs' bill, avers that whether or not the will of said decedent was executed within the statutory period described in said paragraph of plaintiffs' bill was a question of probate for the register, it being true, as averred by plaintiffs, that said will relates solely to the bequests sought to be attacked in this proceeding, and that the finding and decree of the register thereon is binding and conclusive as set forth in the preceeding paragraph; but respondent is informed and believes that the said will was executed a considerable time prior to the statutory period aforesaid, and asks that plaintiffs be put upon strict proof of their allegations in said paragraph. Your respondent further saith that said will is in declaration and execution of a parol trust, upon which the said testator received the property, it having passed to her by the will of
52 her brother, James McAuley, dated 26th Nov., 1870; probated 12th Jan., 1871; registered Will Book 14, page 490.

4th. The allegations of the fourth paragraph are not believed to be material to any controversy between plaintiffs and your respondent, but, so far as the same may be material, asks that plaintiff be put upon proof thereof.

5th. So far as your respondent is informed, it is true that the real estate of said decedent is situated in Allegheny county, State of Pennsylvania, the only real estate in which your respondent is concerned being a house and lot on Duquesne way, in the city of Pittsburgh, county and State aforesaid, of which lot and house said A. M. Byers, administrator, has had the care and charge.

7th. Your respondent, in further answer and defence to the prayer of said plaintiffs' bill, avers that the property devised by said Mary McAuley to your respondent is the house and lot on Duquesne way aforesaid; that same has not be- sold nor is any fund arising from

the sale thereof in court, nor, as your respondent is informed and believes, is there any matter or thing before the court in this proceeding upon which it can act in the way of giving the relief prayed for by plaintiffs against this respondent.

E. O. H. McKNIGHT, *Pres't.*

ALLEGHENY COUNTY, *ss.*:

Before me personally appears Mrs. E. D. McKnight, who, being duly sworn, says that she is the president of the above-named
53 "Home of the Friendless of Pittsburgh and Allegheny," and that the statements made in the foregoing answer, so far as they are made on her own knowledge are true and so far as made on information and belief she believes them to be true.

E. O. H. McKNIGHT.

Sworn and subscribed this 17th day of Nov., 1887.

[L. S.] JAMES F. ROBB,
Notary Public.

Filed Nov. 22, 1887.

H. D. GAMBLE, *Clerk.*

Replication.

Circuit Court of the United States, Western District of Penna.

HENRY B. SHIELDS *et al.* *vs.* ROB'T J. McAULEY. } No. 19. May Term, 1887. In Equity.

Replication.

The replication of Henry B. Shields and Henry B. Shields in right of his wife, complainants, to the answer of Robert J. McAuley and others, defendants.

The repliants, saving and reserving to themselves all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto say that they will
54 aver and prove their said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendants is uncertain, untrue, and insufficient to be replied unto by these repliants; without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things these repliants will be ready to aver and prove as this honorable court shall direct; and humbly pray as in and by their said bill they already prayed.

KNOX & REED,
Solicitors for Complainants.

Filed Dec. 1, 1887.

H. D. GAMBLE, *Clerk.*

Petition of A. M. Byers, Administrator.

In the Circuit Court of the United States for the Western District of Pennsylvania.

HENRY B. SHIELDS *et al.*
vs.
A. M. BYERS, Administrator of All and Singular the Goods and Chattels, &c., of Mary McAuley, Deceased.

No. 19. May Term, 1887. In Equity.

To the honorable the judges of the said court:

55 The petition of A. M. Byers, administrator of all and singular the goods and chattels of Mary McAuley, late of the county of Allegheny, deceased, respectfully shows—

That this honorable court has taken jurisdiction of your petitioner as administrator and of the assets of the decedent, which your petitioner has in his hands.

That among those assets are two hundred and fifty shares of the capital stock of the Citizens' Passenger Railway Company, a corporation of the State of Pennsylvania engaged in the operation of a street passenger railway in the city of Pittsburgh.

That your petitioner on the 1st day of December, 1887, received a letter from John G. Holmes, Esq., connected with the Citizens' Passenger Railway Company, and also with the Citizens' Traction Company, the original of which is hereto annexed and made part of this petition.

Your petitioner shows unto your honors that the said capital stock is exceedingly valuable, but that he is informed and believes that neglect on his part as administrator to sell the said stock or accept stock in the traction railway company for the same is leading to an embarrassment of the Citizens' Passenger Railway Company and might possibly result in the depreciation of the said stock.

That your petitioner is uncertain as to whether it would be more advisable to change said stock for stock in the traction company, or to sell the same at such price as can be obtained for the same to-day; but he is of opinion that one or the other should be done.

56 He therefore respectfully requests that your honors, after due notice given to the parties in interest, will instruct and authorize him to accept either the stock in the traction company, as specified in the letter hereto attached, or that you will authorize him to sell the said Citizens' Passenger Railway Company stock at public auction.

And he will ever pray, &c.

A. M. BYERS,
Adm'r Miss Mary McAuley, Dec'd.

STATE OF PENNSYLVANIA, } ss:
County of Allegheny, }

Personally before me came A. M. Byers, the above-named petitioner, who, being duly sworn according to law, says that the statements contained in the foregoing petition are correct and true.

A. M. BYERS.

Sworn and subscribed before me this 2nd day of December, 1887.

[L. S.] L. H. MATHEWS,
Notary Public.

J. F. Slagle, attorney-at-law, 100 Diamond street.

PITTSBURGH, PA., *November 29th*, '87.

A. M. Byers, Esq.

DEAR SIR: I desire to present to you in a formal way the matter of which we have heretofore talked, in reference to the disposition of the stock of the Citizens' Passenger Railway Company, held by you as administrator of Miss McAuley.

The Citizens' Traction Company was organized under the
57 act of assembly of March 22nd, 1887, with power to operate passenger railways by cable or other mechanical motors. It was especially designed to furnish motive power for the Citizens' Passenger railway and the Transverse road, which had then been leased by the Citizens' Passenger Railway Company.

The act of 1887 does not authorize the building or purchase of railways by traction companies, but does authorize the leasing and operating by motive power railways owned by passenger railway companies.

In accordance with this power a lease of the Citizens' and Transverse railways, property, and franchises was made to the Citizens' Traction Company, based on the present earning power of those roads, with a contract for operating them.

The act of 1887 further authorizes traction companies to purchase stock of the roads which they may lease. Under this power it was expected that the traction company would eventually become owner of all the stock of those companies.

The stock of the traction company was subscribed for by the stockholders of the Citizens' and Transverse Companies, and the subscribers for the stock of the traction company, among themselves as individuals, had an understanding that they would exchange the stock of the traction company held by them for stock of the Citizens' and Transverse Companies held by other parties on the basis of seven shares of traction stock for one of Citizens', and two and one-third shares of traction for one of Transverse.

In accordance with this understanding all the stockholders of the Transverse Company and all the stockholders of the Citizens' Company, except yourself, have surrendered their stock and received for it traction stock on the above basis; and all
58 of the Transverse stock and all the Citizens' stock except yours has been purchased by the traction company.

This arrangement we all regard as very advantageous to the owners of the Citizens' Passenger railway stock, and the ownership of the stock of the railway companies by the traction company will greatly facilitate the management of the business proposes and save a considerable amount of taxes.

In order to perfect these arrangements I will transfer to you seven shares of traction company stock for each share of Citizens' Passenger railway stock now held by you.

Hoping that you will see the advantage of this transaction, I request an early reply.

Very respectfully, JOHN G. HOLMES.

And now, Dec. 3rd, 1887, this petition presented in open court and ordered to be filed and Saturday, Dec. 10, 1887, is fixed for hearing of same and notice is directed to be given to all the counsel of record in this case.

BY THE COURT.

And now, Dec. 10th, 1887, notice having been duly given to all counsel of record, this matter came on to be heard, and upon consideration thereof the court (the counsel for different parties consenting) do authorize the administrator to accept the offer contained in the within letter and exchange for seven (7) shares of the traction Co. one share of Citizens' Passenger R'y Co., and make such exchange for all Citizens' Passenger R'y Co. stock he holds, and after the exchange to hold the traction Co. stock as *amts* of
59 the estate of Mary McAuley, deceased.

BY THE COURT.

Filed Dec. 2, 1887.

H. D. GAMBLE, *Clerk.*

Notice to Counsel of Record.

In the Circuit Court of the United States.

HENRY B. SHIELDS *et al.*
vs.
A. M. BYERS, Adm'r, *et al.* } No. 19. May Term, 1887.

Take notice that A. M. Byers, adm'r of the estate of Mary McAuley, deceased, one of the defendants in the above case, has applied to the court for instructions as to the sale or change of certain stock, which he holds as such administrator, in the Citizens' Passenger Railway Company of the city of Pittsburgh, and that the court have fixed Saturday, December 10th, 1887, for hearing the arguments upon said motion, notice to be given of the same to the attorneys of record in said case.

D. T. WATSON,
Att'y for A. M. Byers, Adm'r.

Dec. 3rd, 1887.

To Knox & Reed, Wm. M. Watson, Lyon & Shoemaker, Thos. Patterson, D. F. Patterson, the attorneys of record in said case.

60 Service accepted this Dec. 3rd, 1887, for the parties of record whom we represent.

KNOX & REED,
D. F. PATTERSON.
LYON & SHOEMAKER.
THOS. PATTERSON.
WM. M. WATSON.

Filed Dec. 3, 1887.

H. D. GAMBLE, *Clerk.*

Appointment of Examiner.

In the Circuit Court of the United States for the Western District of Pennsylvania.

HENRY B. SHIELDS, of Ohio, *et al.*
vs.
ROBERT F. MCAULEY, of New York, *et al.* } No. 19. May Term, 1887.

And now, to wit, December 21st, 1887, on motion of Knox & Reed, solicitors for complainant, George B. Motheral is appointed examiner to take the testimony in above case and report the same to court.

BY THE COURT.

Filed Dec. 21, 1887.

H. D. GAMBLE, *Clerk.*

61 *Præcipe for Appearance.*

HENRY B. SHIELDS *et al.*
vs.
A. M. BYERS, Adm'r, *et al.* } No. 19. May Term, 1887. In Equity.

To H. D. Gamble, Esq., clerk:

Enter our appearance for Margaretta Shear, Robert F. McAuley, and Mrs. Susan Blakely.

January 11th, 1888.

E. P. & C. W. JONES.

Filed Jan'y 14, 1888.

H. D. GAMBLE, *Clerk.*

In the Circuit Court of the United States for the Western District of Pennsylvania.

HENRY B. SHIELDS *et al.*
vs.
A. M. BYERS, Adm'r Robert McAuley, *et al.* } No. 19. May Term, 1887. In Equity.

And now, the — day of January, A. D. 1888, Margaretta Shear, Robert F. McAuley, and Susan Blakely, three of the above defendants, by E. P. & C. W. Jones, their attorneys, prays leave of this honorable court to adopt as their answer to the bill of plaintiffs the

answer of Ebenezer M. McBurney, as filed September 2nd, 1887, in this case.

E. P. & C. W. JONES,
Att'ys for Margaretta Shear, Robert F. McAuley,
62 *and Susan Blakely.*

Jan. —, 1888.

And now, to wit, the 14th day of January, 1888, on motion of E. P. & C. W. Jones, the wtihin petition is granted, and Margaretta Shear, Robert F. McAuley, and Susan Blakely are permitted to adopt as their answer to the bill of complaint as filed the answer of Ebenezer McBurney, filed September 2, 1887.

BY THE COURT.

Filed Jan'y 14, 1888.

H. D. GAMBLE, *Clerk.*

Petition of "Home for Aged Protestant Women" and Order of Court.

In the Circuit Court of the United States for the Western District of Pennsylvania.

HARRY B. SHIELDS *et al.*
vs.
THE HOME FOR THE FRIENDLESS *et al.* } No. 19, of May Term, 1887.

To the Honorable William McKennan, judge of said court:

The petition of "The Home for Aged Protestant Women" respectfully sets forth—

First. Your petitioner is a corporation of the Commonwealth of Pennsylvania and is located at Wilkinsburgh, in the county
63 of Allegheny.

Second. That your petitioner is a legatee under the will of Mary McAuley, late of the county of Allegheny, deceased, and that in said will your petitioner is named "The Home for Protestant Destitute Women."

Third. That proceedings are now pending before this honorable court for the distribution of the estate of said Mary McAuley, deceased; that your petitioner has only recently become informed of said proceedings, and that no notice of said proceedings has ever been served upon petitioner.

Wherefore your petitioner prays the court:

First. To order and allow your petitioner to become a party defendant in the said proceedings at No. 19 of May term, 1887.

Second. That upon settlement of the estate of Mary B. McAuley, deceased, such portion thereof as by the terms of said will was bequeathed to your petitioner under the name of "The Home for Protestant Destitute Women" may be distributed and paid to your petitioner.

Third. For such other and further relief as to your honor in the premises shall seem meet and right and to justice shall appertain.

THE HOME FOR AGED PROTESTANT WOMEN.
JANE HOLMES, *Pres't.*

H. & C. C. BURGUIN,
Solicitors for Petitioner.

ALLEGHENY COUNTY, *ss:*

Before me, a notary public in and for said county, comes
64 Jane Holmes, who, being by me first duly sworn, says that she is president of said corporation "The Home for Aged Protestant Women," and that the facts set forth in the foregoing petition are true, as she verily believes.

Sworn and subscribed before me this 16th day of March, 1888.

[L. S.] EDWARD S. GRACE,
Notary Public.

And now, to wit, March 16, 1888, the foregoing petition — presented in open court, and, upon consideration thereof, the prayer of the petitioner is granted, and the petitioner is allowed to intervene as a defendant.

By the court:

March 16, 1888.

H. D. GAMBLE, *Clerk.*

Testimony Taken Before Geo. B. Motheral, Special Examiner.

In the Circuit Court of the United States for the Western District of Pennsylvania.

HENRY B. SHIELDS *et al.*
vs.
ROBERT F. MCAULEY. } No. 19. May Term, 1887. In Equity.

In open court, on motion of counsel, order granted appointing George B. Motheral, Esq., a special examiner to take testimony in the above-entitled cause and report the same to the court.
65 From the minutes of the circuit court for Dec. 21, 1887.

In testimony whereof witness my hand and the seal of said
[L. S.] court this 21st day of Dec., A. D. 1887.

H. D. GAMBLE, *Clerk.*

In the Circuit Court of the United States for the Western District of Pennsylvania. No. 19. May term, 1887. In Equity.

HENRY B. SHIELDS, a resident and citizen of the State of Ohio, assignee of James McAuley, a resident and citizen of the State of Kansas, and Henry B. Shields, in right of his wife, Melissa M. Shields, also a resident and citizen of the State of Ohio, bring this their bill

against

ROBERT F. MCAULEY, MARY DOUGLASS, SUSAN BLAKELEY, SARAH M. Hill, Robert F. M. Campbell, Mary Parker, James Stewart, all citizens of the State of New York; Rev. John McAuley, a citizen of the State of New Jersey and resident therein; Martha Jane McGogney and William P. McGogney, her husband; Margaret P. Hugus and N. H. Hugus, her husband; Catherine Watson, Dr. William Watson, Wilson Stewart Watson, James M. Watson, Julia Ash, Ebenezer McBurney, Kate Gault, Sarah Thompson, Martha Crawford, Ebenezer McBurney, all citizens and residents of the State of Pennsylvania; William Parker, a resident and citi-
66 zen of the State of Iowa; Eliza Paul, Rilla Wilson, and Dr. J. M. Wilson, her husband; Mary Montgomery, and Dora McAuley, all residents and citizens of the State of Illinois; Eliza A. Egbert and Thomas McAuley, residents of the State of California; James Campbell, a resident and citizen of the State of Nebraska; Thomas M. Watson, a resident and citizen of the State of Minnesota; Ann McCauslin, whose residence is to your orators unknown, none of whom are residents or citizens of the State of Ohio; Mrs. —— Zanningo, a resident and citizen of the State of Iowa, heirs-at-law of Mary McAuley, deceased, late of the city of Pittsburgh, in the State of Pennsylvania, and Alexander M. Byers, administrator *cum testamento annexo* of the estate of said Mary McAuley, deceased, said Alexander M. Byers being a citizen of the State of Pennsylvania and residing in the city of Allegheny, in the county of Allegheny, in said State and in said district; "The Home of the Friendless" and "The Home for Protestant Destitute Women," both corporations of the State of Pennsylvania, operating within the western district thereof.

And now, to-wit, January 17th, 1888, parties appear pursuant to notice at the office of Geo. B. Motheral, examiner, room 14, Bakewell law building, Pittsburgh, Penna., at the hour of 2 o'clock in the afternoon, and the taking of testimony proceeds.

Present: Knox & Reed, Esqs., attorneys for the plaintiff; W. M. Watson, Esq., attorney for Thomas M. Watson, Dr. William Watson, James M. Watson, Martha Jane McGogney, and Wm. B.
67 McGogney, Margaret P. Hugus and N. H. Hugus, Catharine Watson, Wilson Stewart Watson, Dora McAuley, Rilla Wilson, and J. M. Wilson; D. F. Patterson, Esq., representing Patterson, Donans & McBurney, attorneys for Ebenezer M. McBurney (sued as Ebenezer McBurney), Ebenezer McBurney, Sarah Thompson, Catharine Gualt (sued as Kate Gualt), Eliza Monzingo (sued as

Mrs. Zamingo), and Martha Crawford; E. P. & C. W. Jones, Esqs., attorneys for Margaret Shear, Robert F. McAuley, and Mrs. Susan Blakeley; D. T. Watson, Esq., attorney for Alexander M. Byers, administrator of the estate of Mary McAuley, dec'd.

Adjourned to meet January 18th, 1888, at 10 o'clock a. m., at the same place.

And now, to wit, January 18th, 1888, parties ap-ear pursuant to adjournment and the taking of testimony resumed.

Present: Knox & Reed, Esqs., attorneys for plaintiff; Lyon & Shoemaker, Esqs., attorneys for Mary Montgomery, Joseph A. Montgomery, Margaret Ann Payne, Dexter C. Payne, Eliza Paul, Eli Paul, Mary Parker, Jane Stewart, John A. Stewart, Wm. M. Parker, Sarah Hill, and Robert F. Campbell; D. F. Patterson, Esq., attorney for Eebenzer H. McBurney *et al.;* W. M. Watson, Esq., attorney for J. M. Wilson *et al.;* E. P. & C. W. Jones, Esqs., attorneys for Robert F. McAuley *et al.;* D. T. Watson, Esq., attorney for A. M.
68 Byers, administrator; Thos. Patterson, Esq, attorney for "Home of Friendless."

Plaintiff's counsel offer the admission by the pleadings as to the allegations of the first paragraph of the bill, to wit:

"That Mary McAuley, late of the county of Allegheny, in the western district of Pennsylvania, deceased, died on the 6th day of January, 1886, and until and at the time of her death was a citizen of the State of Pennsylvania aforesaid and resident in the western district thereof."

"That said Mary McAuley died unmarried, without issue or lineal descendants, father or mother, brother or sister, uncle or aunt, nephew or niece, or any issue of nephew or neice, and leaving to survive her as one of her heirs a first cousin, to wit, James McAuley, a citizen of the State of Kansas and now residing therein, and that said interest of said James McAuley exceeds the sum of three thousand dollars over and above interest and costs."

"That the said Mary McAuley left also to survive her one of the plaintiffs in the bill, to wit, Melissa M. Shields, who is a resident and citizen of the State of Ohio, and also the parties defendant in this bill, whose names, residences, and citizenship, so far as known, are alleged in the stating part of the bill."

"That Henry B. Shields, who claims to be plaintiff in this case by right of the assignment of the interest of said James McAuley, is a resident and a citizen of the State of Ohio."

"That none of the parties to this bill other than the plaintiffs are residents and citizens of the State of Ohio."

69 Counsel for plaintiff offer in evidence the assignment by James McAuley to said Henry B. Shields of his interest in the said estate of said Mary McAuley, deceased, dated the 24th day of March, 1887.

Counsel for plaintiff also offer the admission, by the pleadings, as to the allegations of the second paragraph of the bill, to wit:

"That on the 12th day of January, 1888, a writing purporting to

be the last will and testament of said Mary McAuley, deceased, was offered for probate in said county of Allegheny by A. M. Byers, one of the defendants in this bill, and was admitted by the register of wills of said county, and thereupon said register issued to said A. M. Byers letters of administration *cum testamento annexo* upon the estate of said decedent, who thereupon gave bond in the sum of four hundred thousand dollars and qualified as administrator aforesaid."

Counsel for plaintiff offer in evidence the will of the said Mary McAuley, deceased, which was admitted to probate and which is as follows, to wit:

"By the request of my dear brother my house on Duquesne way is to be sold at my death and the proceeds to be divided between the Home of the Friendless and the Home for Protestant Destitute Women.

(Signed) MARY McAULEY."

Which said will has been duly probated in the office of the register of wills for Allegheny county upon the 12th day of January, 1886, and is recorded in the office of said register in Will
70 Book, vol. —, page —, and the decree of the register aforesaid admitting said will to probate being offered in connection with said will.

It is also admitted by the counsel for the Home of the Friendless that the "Home for the Friendless" is an institution for purely public charity.

It is also admitted that said Mary McAuley died seized of a large estate, partly realty and partly personalty, which really consisted of a house and lot on Duquesne way, in the city of Pittsburgh, county of Allegheny and State of Pennsylvania, being the same referred to in said will of said Mary McAuley, deceased.

That claiming the estate of said Mary McAuley are two classes of claimants, to wit, the first and the second cousins of said decedent; that the said plaintiff, Henry B. Shields, claims a first cousin's share as assignee of James McAuley, which said James McAuley was a first cousin of the decedent and Melissa M. Shields aforesaid, and Henry B. Shield, in right of said Melissa M. Shields, claiming a second cousin's share of said estate, and that of the parties defendant to this bill some are first cousins and some are second cousins of the decedent.

Counsel for plaintiff offer in evidence the inventory and appraisement of the estate of Mary McAuley, deceased, filed in the office of the register of wills, in Allegheny county, Pennsylvania, in Record of Inventory and Appraisement Book, vol. 1, page 354, and
71 numbered 279, on the 12th day of February, 1886, which is as follows:

"COUNTY OF ALLEGHENY, *ss:*

Personally came before me, a notary public in and for said county, the following-named persons, viz., J. Kidd Fleming and John Ballentine, who, being duly sworn, did depose and say that they, at the

request of Alexander M. Byers, would well and truly and without prejudice or partiality value and appraise the goods and chattels, rights and credits, which were of Mary McAuley, deceased, and in all respects perform their duties as appraisers to the best of their skill and judgment.

J. KIDD FLEMING,
JOHN BALLENTINE,
Appraisers.

Sworn and subscribed this 8th day of February, 1886.
WM. T. HOWE, *N. P.*

574 shares of Iron City National Bank of Pittsburgh stock, at $75.00 per share		$43,050 00
119 shares of Mechanics' National Bank of Pittsburgh stock, at $80.00 per share		9,520 00
250 shares of the Citizens' Passenger Railway Company of Pittsburgh stock, at $83.33⅓ per share		20,833 33
250 shares of Allegheny Bridge Company stock, 6th St., Pittsburgh to Federal St. Allegheny, at $50.00 per share		12,500 00
220 shares of Pittsburgh Gas Company stock, at $40.00 per share		8,800 00
One mortgage on real estate		9,000 00
One promissory note		5,000 00
One promissory note		10,000 00
72 One oil painting, landscape		8 00
One oil painting, "		15 00
One oil painting, masquerade		10 00
One oil painting, cattle scene		10 00
Two bronze ornaments, $15.00 each		30 00
One small mirror		50
One lot of photographic views and portraits		1 00
One lot of unbound books and magazines		25
Two walking-canes and one umbrella		1 00
One album, .25; one work box, .25; one duster, 5; 2 vases, .25, and card receiver, .25		80
One powder box, .10; one inkstand, .10; 3 match boxes, .15; one marble weight, 5		40
60 vol's bound and half-bound books, 10c. each		6 00
Two old trunks		1 00
Ladies' wearing apparel, consisting of dresses, underwear, bonnets, &c., and also bed linen		150 00
One pin		75 00
Bedroom furniture, consisting of 2 tables, 4 chairs, one working chair, and one lounge		50 00
One lot of tableware, china, &c.		50 00
One penknife, .25; tortoise shell eye-glasses, .25; 2 pocket-books, .25, and 2 purses, .25		75
One razor, 5, and 3 box trunks, 5.00		5 05
One set jet jewelry, breastpin, 2 pieces, ear-rings and cross		2 00

Two breast pins, pearl and amber	$	10
One gold watch and 2 chains		20 00
73 One pair gold spectacles and 2 p'rs gold eye-glasses		5 00
One gold thimble		2 00
One linen portfolio, bank book, and mosaic pin, broken		1 00
One pocket-book with memorandum of bequests, and one set hair jewelry		1 00
One lot of common jewelry		1 00
One plain gold ring		90
One solitary diamond ring, large		30 00
One solitary diamond ring, small		10 00
One diamond ring, garnet centre		15 00
One pair diamond ear-rings		70 00
One cluster diamond pin		35 00
One diamond stud		25 00
Gold coin in pocket-book		1 25
Silver and copper coin in pocket-book		2 35
Cash in bank	101,246	15
	$220,585	83

A. M. BYERS,
Administrator.

Filed February 12th, 1886.

Counsel for plaintiff also offer in evidence the marshall's return upon the alias subpœna; which return is dated June 9th, 1887, showing, as to the "Home for the Protestant Destitute Women," one of the defendants in the said bill and one of the legatees named in said will, that he returned the said writ *non est.*

74 COUNSEL FOR THE HOME FOR THE FRIENDLESS: I offer in evidence the account of A. M. Byers, admin-strator of Mary McAuley, deceased, attached to the plea filed in this case.

COUNSEL FOR THE PLAINTIFF: I object to the offer of the account attached to the plea of A. M. Byers, administrator, as incompetent and irrelevent.

COUNSEL FOR THE HOME FOR THE FRIENDLESS: I offer in evidence the seventh paragraph of my answer *of* this case—paragraph of the answer of the Home for the Friendless:

"Your respondent, in further answer and defence to prayer of said plaintiff's bill, avers that the property devised to your respondent is a house and lot on Duquesne way aforesaid; that same has not been sold, nor is any fund arising from the sale thereof in court."

COUNSEL FOR THE HOME FOR THE FRIENDLESS: I further offer in evidence the will of James McAuley, dated 26th day of November, 1870; probated 12th day of January, 1871, and registered in the office of the register of Allegheny county, in Will Book, vol. 14, page 490, and which is as follows:

"I, James McAuley, of the city of Pittsburgh, county of Allegheny, State of Pennsylvania, make the following will:

1. To Ebenezer McBurney
2. To Sam'l McBurney
3. To Letitia Jackson
4. To Maggie McBride
75 5. To Richard Hays
6. To Annie Hays
7. To Mary Jane Ballentine
8. To John Croth

9. To the Home of the Friendless I bequeath fifty (50) shares of the capital stock of the People's National Bank of Pittsburgh, twenty (20) of which shares shall be used in the construction of the contemplated buildings for said home, and the income of the remaining thirty (30) shares of which shall be used in the support and maintenance of the inmates of said Home of the Friendless.

10. To the Home for the Destitute Protestant Women, I bequeath six mortgage bonds of the Allegheny Valley railroad two of which bonds shall be used in the construction of buildings now being erected for said home in Wilkins township, Allegheny, and the income of the remainder of which bonds shall be used in the support and maintenance of the inmates of said home.

11. To the Allegheny Orphans' Asylum I bequeath and give fourteen (14) shares of the capital stock of the Allegheny Gas Company &c.
12. To John McGoffin &c.
13. To George R. Duncan
14. James Mehaffey
15. To Alice Henry

—. To my sisters Margaret and Mary McAuley I give and bequeath two hundred and fifty (250) shares of the capital stock of the Citizens' Passenger Railway Company, of Pittsburgh, three
76 hundred and seventy-four (374) shares of the capital stock of the Iron City National Bank of Pittsburgh, one hundred and fifty (150) shares of the capital stock of the Pittsburgh and Allegheny Suspension Bridge Company; one hundred shares of the capital stock of the Pittsburgh Gas Company all my household furniture, jewelry and plate, and the house and lot on Duquesne way in the city of Pittsburgh, in which I now reside.

17. All the rest and residue of my estate real and personal remaining after the above bequests and devises and the payment of the collateral inheritance tax thereon, and the payment of my debts, I give and bequeath to Richard Hays in trust &c.,

18. I constitute and appoint John Magoffin, executor of the foregoing will.

In testimony of the execution of the foregoing my last will and testament, I have hereunto set my hand and seal this 26th day of November, A. D. one thousand eight hundred and seventy.

JAMES McAULEY. [SEAL.]

We, the undersigned, have hereunto subscribed our names as witnesses to the foregoing will of James McAuley at his request

and in his presence, and in the presence of each other, this 26th day of November, A. D. 1870.

R. MILLER, JR.
DAVID H. LONG.
W. G. HAWKINS.

Probated January 12th, 1871.
Letters testamentary granted January 12th, 1871.

77 Adjourned to Tuesday, January 24th, 1888, at 3 o'clock p. m.

And now, to wit, January 24th, 1888, parties appear and the taking of the testimony resumed.

Present: Knox & Reed, Esqs., attorneys for plaintiff; D. F. Patterson, Esq., attorney for Ebenezer M. McBurney *et al.;* W. M. Watson, Esq., attorney for J. M. Wilson *et al.;* E. P. & C. W. Jones, att'ys for Rob't F. McAuley *et al.;* Thos. Patterson, Esq., attorney for Home for the Friendless.

NEWTON PETRIE, a witness called on behalf of the "Home for the Friendless," being duly sworn, in answer to questions by Mr. THOS. PATTERSON testifies as follows:

Q. Mr. Petrie, what is your occupation?
A. Deputy register.
Q. Were you deputy register in the year 1886?
A. Yes, sir.
Q. I wish you would state whether or not you were there at the time of the probating of the will or paper purporting to be the will of Mary McAuley.
A. Yes, sir.
Q. Have you the original paper with you?
A. I have it with me. (Witness produces paper.)
Q. Mr. Petrie, I ask you to look at that paper and state whether or not that is the condition in which the paper has been lying in the file in which it has been retained in the register's office since the date of probate.

78 A. Yes, sir; same condition as when it was brought in; was filed in that shape on day of probate. You can see the creases in it.

Q. It was folded according to the lines which are now apparent on the paper?
A. Yes, sir.
Q. And how was it lying in the register's office?
A. Same shape it is now.
Q. Straightened out?
A. Yes, sir.
Q. It has not been folded or creased in the register's office?
A. No, sir.
Q. Can you state the date of probate?
A. January 12th, 1886.

Q. I wish you would state, Mr. Petrie, whether the paper is the same in appearance as it was when presented to you for probate?

A. Yes, sir; I think so.

Q. You examined the paper at that time when it was produced.

A. Yes, sir.

Q. And it has the same appearance as to color and age and marks upon it, with the exception of pencil marks of witnesses, that it had then?

A. Yes, sir.

Q. By whom were these pencil marks made?

A. By myself.

Q. Who presented the will for probate, who handed it you?

A. My recollection is that A. M. Byers brought it up and with him Mr. Duncan and other witnesses to prove handwriting—my
79 recollection of it.

Cross-examination waived.

Hon. WM. C. HAWKINS, a witness called on behalf of the "Home for the Friendless," being duly sworn, in answer to questions by THOS. PATTERSON testifies as follows:

Q. Judge Hawkins, you were acquainted with Mary McAuley?

A. Yes, sir: very well.

Q. How many years were you acquainted with her?

A. 20 or 25 years.

Q. Were you on friendly terms with her in regard to her business matters?

A. Very intimate terms with her for the last 10 or 15 years. She frequently spoke about her business matters. I was her counsel before I went on the bench and frequently called on her afterwards as her friend.

Q. I show you the paper exhibited by the last witness as the will of Mary McAuley, and ask you if you have ever seen it before.

A. Yes, sir, I have. I saw it the day after her death.

Q. I wish you would state under what circumstances—in what way—you found the paper.

A. Mr. C. B. Herron, A. H. Byers, and I examined her papers, or rather they examined her papers in my presence and among others this was found.

Q. Do you recollect where it was found?

A. It was found among other papers; my impression is, in a drawer with other papers that appeared to be old.

80 Q. Was it laid out straight as it now is or folded?

A. My recollection is it was folded and the ink had the same appearance, I am positive, as now.

Q. State whether the general appearance of the paper as to color and signs of age was just the same as it is now?

A. It was.

Q. Judge Hawkins, I wish you would state whether or not during her life Mary McAuley had any conversation with you relative to her will?

COUNSEL FOR PLAINTIFF: Objected to as incompetent and irrelevant.

A. On one occasion, with apparent expression of anxiety on her face, she asked me if a writing signed by herself would be valid as a will and I told her yes, and she seemed relieved; the anxious expression seemed to pass away from her face.

Q. Were there any other conversations?

A. None relative to that matter; that was about two or three years before she died. This paper along with others were placed in possession of Mr. Herron and kept by him until they were transferred to Mr. A. M. Byers, the administrator; at least, Mr. Herron told me he kept them. I had frequent conversations with Miss McAuley about making a will, but this is the only conversation I recollect from which I inferred that she had signed any paper.

Cross-examination.

By J. H. REED, Esq.:

Q. You had frequent conversations before and after in regard to making a will?

81 A. Yes, sir.

Q. Never told you she hadn't made a will?

A. Never told me she hadn't.

Q. Never told you she had?

A. Never told me she had.

Q. Talked after this conversation in regard to the subject of making a will and the disposal of her estate, did she?

A. Yes, sir; both before and after this.

Redirect examination.

By Mr. THOS. PATTERSON:

Q. When she spoke to you your suggestions to her in making a formal will was with relation to disposition among her kin?

By WILLIAM M. WATSON, Esq., counsel for J. M. Wilson *et al.*: I object.

A. I do not understand the question.

Q. I asked whether or not in these conversations that Mr. Reed has spoken about upon this subject were they not with relation to disposal of her property among her kindred?

A. Well, she spoke about having a great many relatives, some of whom she knew and some of whom she did not know, and the conversation turned upon showing preference or not in making a will among her relatives; did not say anything about charitable institutions, as far as I recollect. The conversation turned upon distribution among her relatives.

J. B. FLACK, a witness called on behalf of the "Home for
82 the Friendless," being duly sworn, in answer to questions by Mr. THOS. PATTERSON testified as follows:

Q. You are a member of the bar, Mr. Flack, are you not?

A. Yes, sir; I am.

Q. Mr. Flack, I wish you would state whether or not you have made any special study of the subject of handwriting.

A. I have for a number of years past.

Q. To what extent have you carried it?

A. Well, I have been a witness on handwriting in a number of counties in western Pennsylvania and elsewhere, in Allegheny county courts, United States courts, &c., for the last 12 or 13 years.

Q. I show you, Mr. Flack, the paper which has been exhibited by the register here as the last will of Mary McAuley, and ask you to look at it.

COUNSEL FOR PLAINTIFF: What is the purpose of this question?

COUNSEL FOR HOME FOR THE FRIENDLESS: I propose to examine the witness upon his expert knowledge of handwriting and papers to testify as to any apparent marks of age or preservation of paper or condition of the writing and the paper.

COUNSEL FOR THE PLAINTIFF: I object to that, that it is not within the province of an expert of handwriting, and that, there being no dispute in this case that Miss Mary McAuley signed and write the paper in question, the evidence is incompetent and irrele-
83 vant.

Q. Well, Mr. Flack, state whether or not from that paper you can give an opinion as an expert whether there is anything tending to indicate age.

A. The paper has been written upon before folding——

Q. Stopping there a moment, will you state upon what you base your belief upon that?

A. Because of the evenness of the writing over the folds at present. The paper bears the appearance of having been filed or carried in a pocket-book or wallet or something of that kind for a considerable length of time in contact with some object that would swell it. The paper has become dog-eared in that time, and upon turning up the corners that was done we see that is since the folding and carrying, and the dog-eared was done since the folding; on the outer portion, in being folded up in quarto form, the paper is worn through in places. It has been folded and carried for a long time, so that, the inner fold being closer, one of the two has broken at the outer edge. This is the inner fold; the outer fold being larger — not as liable to break. There also seems to have been a fold on the corner after the first fold, as ladies are sometimes in the habit of folding up the corner of a note that gives the appearance in the centre——

Q. That is not a water mark, then?

A. No, sir.

Q. Mr. Flack, when you state that this paper has been lying a long time or that it was a long time folded before it was straight-

ened out as it is now, will you state what you mean by that, whether that means several months or how long?

84 A. Several months or longer—depending upon the habits of the party having it in charge.

Q. It was at least several months?

A. Yes, sir.

Cross-examination.

By Mr. REED:

Q. Depend upon the habits of the party who had it in charge and, I suppose, the number of times the paper was handled, would it not?

A. Depend upon the number of times it would be handled and habits of the party carrying it.

Q. Suppose it was put in a pocket-book and that there was daily occasion to open the pocket-book and reach in the book for money or car tickets or a thousand and one things that a lady carries in her pocket-book, would it not cause this paper to bear the appearance of age that it would not have had if it had been carried where it would not — been touched?

A. Certainly.

Q. What sort of paper is this written on—what do you judge it to be?

A. Well, it is almost what is called by the trade "onion skin," not quite as light as onion skin paper.

Q. Sort called ladies' note paper?

A. Ladies' note paper; yes, sir.

Q. It is a piece of ladies' note paper?

A. Yes, sir.

Q. It bears evidence of being part of a larger piece of paper, does it not?

85 A. Can't say about that.

Q. (Witness handed paper.) Can't you say about that?

A. I guess it has been.

Q. It has been cut or torn from a larger piece of paper?

A. Yes, sir.

Q. Which edge did you say was torn?

A. This is the inner fold——

Q. I know, but you say it was part of a larger piece of paper?

A. It appears here to be torn, and this may have been cut or it may have been torn from oblong note-book.

Q. Which end is that?

A. The outer edge of the outer fold.

Q. That is the left-hand edge?

A. The left-hand edge.

By WILLIAM M. WATSON, Esq., counsel for J. M. Wilson *et al.*:

Q. Suppose that was a sheet of paper, which part of the sheet is this piece—upper or lower part or intermediate part?

A. Well, it bears the appearance of having been cut here.

Q. On the lower edge?
A. On the lower edge.
Q. Then you say this was the upper part of the sheet?
A. Well, I could not say whether that was the upper part or not; could not say at all, because there are no indications to determine whether upper or lower part of the sheet or off the middle. This is water line there, so there is no indication from that water line.
Q. Well, if it is not an upper part then it is an intermediate part?
86 A. It might be an intermediate part.

By B. P. JONES, Esq., counsel for Robert F. McAuley *et al.*:

Q. Well, Mr. Flack, you stated you thought that that was a leaf out of a note book?
A. I say it bears that appearance.
Q. Such a note book as is usually carried in the pocket?
A. It bears that appearance; it may have been cut from a sheet.

By WILLIAM M. WATSON, Esq., counsel for J. M. Wilson *et al.*:

Q. Does it not bear the appearance equally of coming from part of a sheet?
A. It may — been part of a sheet.
Q. Then this may have been part of a whole sheet or a letter?
A. It may have been.

COUNSEL FOR THE HOME FOR THE FRIENDLESS: I offer in evidence the paper or will of Mary McAuley, deceased, which has been shown here in the evidence and which is recorded in Will Book, vol. 29, page 275, to be exhibited to the court at the argument.

Adjourned until Thursday, February 2nd, 1888, at 2 o'clock p. m.

And now, to wit, Feb. 2nd, 1888, owing to abscence of counsel for the plaintiff from the city, case adjourned to a day to be agreed upon by counsel.

And now, to wit, Feb. 10th, 1888, agreement of counsel
87 to meet Thursday, February 16th, 1888.

And now, to wit, Feb. 16th, 1888, agreement of counsel to meet Friday, Feb. 17th, 1888, at 3 o'clock p. m.

And now, to wit, February 17th, 1888, parties appear and the taking of testimony resumed.

Present: Knox & Reed, Esqs., att'ys for plaintiff; D. F. Patterson, Esq., attorney for Ebenezer M. McBurney *et al.*; W. M. Watson, Esq., Attorney for J. M. Wilson *et al.*; D. T. Watson, Esq., attorney for A. M. Byers, adm'r; Lyon & Shoemaker, Esqs., attorneys for Mary Montgomery *et al.*

Owing to absence of attorney for the Home for the Friendless, adjourned to meet Tuesday, February 21st, 1888, at 3 o'clock p. m.

And now, to wit, Feb. 21st, 1888, agreement of counsel to adjourn until Friday, Feb. 24th, 1888, at 3 o'clock p. m.

And now, to wit, Feb. 24th, 1888, parties appear and the taking of testimony resumed.

Present: Knox & Reed, Esqs., attorneys for plaintiff; D. T. Watson, Esq., attorney for A. M. Byers, adm'r; W. M. Watson, Esq., attorney for J. M. Wilson *et al.*; D. F. Patterson, Esq., attorney for Ebenezer McBurney *et al.*; Thos. Paterson, Esq., attorney for "Home for the Friendless."

88 A. M. BYERS, a witness called on behalf of the "Home for the Friendless," being duly sworn, in answer to questions by THOS. PATTERSON testifies as follows:

Q. Mr. Byers, you are the administrator with will annexed of the estate of Miss Mary McAuley?

A. Yes, sir.

Q. You knew her in her lifetime?

A. Yes, sir.

Q. Where did she live prior to her death?

A. On Duquesne way.

Q. Was she living there immediately prior to her death?

A. Not immediately prior; about ten years prior to her death, in 1886. She moved away from Duquesne way in about 1871 or '2.

Q. Where did she live during the intervening time?

A. At the Monongahela house.

Q. Mr. Byers, state whether or not with other persons you made an examination of her papers after her death.

A. Yes, sir.

Q. Who was present at the time?

A. Well, I made—examination was made the afternoon of the day she was found dead, and at that time Judge Hawkins, C. B. Herron—Campbell B. Herron—were present and also my sister, Mrs. Miller.

Q. And that examination resulted in the finding of the testamentary paper which has been admitted to probate?

A. The will?

Q. Yes, sir.

A. Yes, sir.

Q. That was on the afternoon of the day she died?

89 A. Afternoon of the day she died. She died in the morning; at least she was found dead.

Q. Do you recollect, Mr. Byers, whereabouts in her room this paper was found? I believe it was in her room, wherever it was.

A. It was in the room which she occupied. I think it was found in a trunk, folded up into a very small space and stuck in a little pocket-book—a little wallet—a little, old wallet, that looked as though it had been laying there some time.

Q. Where was the wallet lying?

A. In the trunk.

Q. Were there any other papers immediately about the wallet?

A. Oh, I am unable now to tell you; the trunk was filled up with a lot of old trinkets and jewelry and some clothing. I have really forgotten what we did find in there; there was a lot of old keepsakes of one kind or another.

Q. In what part of the trunk, with relation to the other matter that was in it, was this wallet found? Was it on top?

Q. My recollection of it is that it was on one of the trays or bottom of the trunk; I am not clear as to where exactly. I believe—I think that either Judge Hawkins or C. F. Herron—or I am not clear—it may have been my sister—some of the party present—was taking and handing the things out of the trunk and the others were opening them and examining them.

Q. Well, you found the wallet in one of the tills of the trunk, according to your recollection. Can you recollect whether there were other papers of any description about the wallet?

A. I think so. I think there were other memoranda, papers, and some other things, but this little piece of paper—my recollec-
90 tion of it is that it was folded up in a very small space and stuck away, and it looked as though it had been there for some time.

Q. Do you remember the date of any of the papers or what they contained?

A. I do not; Miss McAuley's papers were very much scattered. We found receipted bills in that trunk and others thrown into the wardrobe in the room and in the paper hat boxes; number of these folded up with them.

Q. Were there any newspapers about where this wallet was found?

A. I am not so positive about that; I do not remember; I should say not; I do not think so.

Q. Did the paper, when you looked at it—this little paper—bear any marks of age?

A. It looked to me as if it might have been there some time.

Q. When you say some time how long do you mean by that; for a day or two?

A. Oh, no; it looked as though it might have been there for some time—not a day or two, but as though it might have been there for a year or more. It was written on a fine piece of white paper and then folded up and stuck into a very small wallet, and the folds indicated that it had been there some time.

Q. Were the folds creased at that time?

A. Yes, sir; very much.

Q. Was the paper discolored any on the outside?

A. Simply, I think, from the stain of the wallet, maybe.

Q. When you speak of how it was folded I do not remember whether you stated how it was folded or not.

91 A. My recollection of it is that it was written on note sheet—not letter shee—and doubled over and folded up into a square—into a piece of paper that would not be—would not exceed 1½ inches square or nearly so.

Q. Folded twice, then?

A. Yes, sir; perhaps; folded over and folded twice; yes, sir; in all probability.

Q. Who had the custody of the paper, Mr. Byers, from that time?

A. I think the paper, papers in the trunk, jewelry, and one thing or another was left in the custody of Mr. Herron until such time as I was appointed administrator or when they were handed over to me. There was a memoranda or inventory, I think, taken of them either that day or the next day of what was delivered to me.

Q. Were any of these receipted bills you speak of with this paper?

A. With the will?

Q. Yes, sir.

A. Not immediately in that pocket-book.

Q. In the trunk—in the till with this pocket-book?

A. Well, as I say, I am not clear as to what we found there. There were papers there in the drawers, in the bonnet boxes, and may have been some in this trunk—perhaps was—I do not remember exactly. I know that this will was found in this pocket-book.

Q. Do you remember the date of the death of Miss McAuley?

A. 6th of January, 1886, I think.

Cross-examination.

By WILLIAM M. WATSON:

92 Q. You stated that that was an old pocket-book, Mr. Byers.

A. My recollection of it is that it was an old pocket-book.

CAMPBELL B. HERRON, a witness called on behalf of the Home for the Friendless, being duly sworn, in answer to questions by Mr. THOS. PATTERSON testifies as follows:

Q. Mr. Herron, were you acquainted with Miss Mary McAuley?

A. Very well for many years; sonce 1840 up.

Q. Where had she been living prior to her death?

A. At the Monongahela house and in the city of Pittsburgh during the days of her brother.

Q. Mr. Herron, state whether at the time of her death or immediately after her death you, with other persons, made an examination of her papers.

A. I did.

Q. How long after her death?

A. I am not able to say definitely—shortly afterwards.

Q. Was it the same day?

A. It was very soon afterwards—hardly that day. Just at that time, you know, the coroner had taken possession; would not say it was the same day, but it was the same day or the next.

Q. Who else was present?

A. Mr. ——, Monongahela house man—Griscom. Judge Hawkins was there, Mr. Byers was there, and myself, and there was some of the ladies connected around the room—Mrs. Byers, for instance, was there, and I think Mrs. Miller was there—Mr. Byers' sister.

93 Q. Did your investigation or search of her papers result in the finding of the will which was afterwards admitted to probate?

A. Yes, sir.

Q. Can you tell us where that will was found?

A. It was found in a pocket-book, somewhat ancient. I have a very distinct recollection of the little package about that long and very much wrapped over with white thread, and among these papers it was wrapped up with was a few of the newspaper compliments upon James McAuley's death was in the package, and this paper—this will—was in among them wrapped up woman-like, as you fellows that are married know more about that than I do; your wife when she commences to wrap anything up in a package, she wraps thread around it until you can hardly see it; this was wrapped up in that way. The notices I recollect; there was the Gazette, for instance, and, I think, all of the morning papers; what you call complimentary notices on the death of a man occupying a prominent position in council.

Q. Do you remember about the date—the year of the date of these papers?

A. I could only by referring to when James McAuley died.

Q. Well, when was that?

A. It was, maybe, 14 or 15 years before Miss McAuley's death, and she died two years ago.

Q. Quite a number of years ago?

A. Oh, yes; I was present in his house very often when he was confined to his room; sat up with him occasionally; saw him every day or less; often been at his house, and was in the office with him from '53 to '57.

94 Q. As I understand you, this old pocket-book and these newspaper clippings were together in a package, and were they folded up with other papers?

A. No; you take and cut a piece out of the newspaper to save it, you would naturally wrap it up by itself; that was the way it was.

Q. They were tied up with the package?

A. No; in the pocket-book with this will.

Q. Was it in the same package with the papers inside the pocket-book?

A. Yes, sir.

Q. Were there any other pocket-books in the room?

A. There were several kinds of pocket-books; she had a great many things in which we made very little examination.

Q. Did the paper or the will when you found it evince any marks of age; did it seem like a fresh paper or an old one?

A. It did not seem like a fresh paper at all; it was carefully folded up; it had not, evidently, received much constant folding and refolding; it did not appear to exhibit much of that anyhow; you put papers in your own pocket-book, they will cut if you handle them.

Q. This paper was folded in what shape; do you remember how it was folded?

A. Could not give any opinion of that; it was folded with other papers and wrapped around with threads.

Q. Didn't the creases appear to have cut into the paper as *thou* though folded up for some time?

A. Did not so appear at that time; in fact, the newspapers did not show any evidence of their age; they were carefully preserved.

95 Q. You could not say, than, that this little paper appeared to have been cut through the folds?

A. I know nothing of that kind; no, sir.

Q. Who had possession of that paper from the time it was found until the time of probate?

A. Well, these papers were in my possession.

Q. That is, these papers that were found tied up with the original will?

A. The original will was in my possession until I was authorizzed to hand it over to Mr. Byers. I have copy of what handed over to him, but I failed to put it in my pocket.

Q. You were one of those who took the will up to the register's office for probate?

A. Yes, sir; I was there.

Q. The will was in your possession until that time?

A. Yes, sir.

Q. While it was in your possession was it altered any in appearance?

A. No, sir.

Q. Was it folded or unfolded any?

A. No, sir.

Q. Still remained in the same condition?

A. Yes, sir; it was so small in its dimensions that it was not necessary to go into any great folding of it.

Q. And you delivered it in the same condition you found it?

A. I took it over to my private office and locked it up in my private drawer in our safe and turned it over to the proper officer of the court—the register.

96 Q. And nothing occurred while it was in your possession to alter its appearance?

A. No. No person had access to it but myself, and I had no interest in looking at it. I might say at this point, which I suppose I can do clearly under oath, that Judge Hawkins stated that we would find such a paper.

Q. That was before the paper was discovered?

A. Yes, sir.

Q. You are familiar with Miss Mary McAuley's writing?

A. Oh, I would say generally so.

Q. Was the whole paper in her writing?

A. Oh, it was all written by the same person.

Cross-examination.

By WILLIAM M. WATSON:

Q. Mr. Herron, are you an expert in handwriting?

A. I used to be somewhat. I have, I believe—I do not know whether I could lay my hand on it to-day—a little circumstance to show that it was her handwriting.

By Mr. REED:

Q. Mr. Herron, what part of the room was this pocket-book found in?

A. Now, I could really hardly say. It was found in the trunk or the bureau; it was found in the room.

A. M. BYERS recalled by Mr. THOS. PATTERSON:

Q. Mr. Byers, have you heard Mr. Herron's testimony?

A. Yes, sir.

97 Q. I wish you would state now whether from your own recollection you can recollect the papers being found in that pocket-book.

A. Yes, sir; I remember. Mr. Herron's testimony recalls to my mind that it was found wrapped up that way with these slips; these slips with reference to James McAuley's death were found in the same package, and wrapped around a great many times with white cotton thread.

Q. The will was wrapped in this package?

A. The package contained newspapers and this little will.

Q. Was the will inside of these slips?

A. It was part of that package; it was partly folded under the other. We did not examine the slips of paper, but they were such as is usually written about any man of prominence. The paper upon which the will was written was not a full sheet of note paper, it was perhaps $\frac{2}{3}$ of a sheet, and then folded over and doubled again and folded up into about $1\frac{1}{2}$ or perhaps 2 inches long by 3 inches wide, and the other slips were with it and were wrapped together in one of the pockets of this old pocket-book, and my recollection is very distinct on the subject that it was found in this trunk, for the reason that Judge Hawkins told us before we went into the room—the judge advised us that as it was in a hotel and public room that somebody should immediately go and take charge of the effects, and Mr. Herron, Judge Hawkins, and Mr. Griscom came in afterwards, and my sister and my wife were in and out of the room, but the three gentlemen, Judge Hawkins, Mr. Herron, and myself, began to take an account of the jewelry and other articles, and Judge Hawkins stated to us before we went into the room that he had

98 no doubt her will would be found and that we would find it in the bureau drawer, and that drawer was examined first, because, as I have said, a great many papers and receipted bills were found in there, but the will was found after we opened the trunk.

Q. But you do not remember how far down in the trunk the till that contained the will was?

A. My recollection of that is that the tray that was lifted out first had some clothing in, and then it was found in the bottom of the trunk; it was found down in another tray or down in the bottom of the trunk.

Cross-examination.

By WILLIAM M. WATSON:

Q. Was that the only trunk there was in the room?

A. I think that was the only trunk.

Adjourned to Friday, March 2nd, 1888, at 3 p. m.

And now, March 2nd, 1888, parties appear and the taking of testimony resumed.

Present: Knox & Reed, attorneys for Henry B. Shields *et al.*; W. M. Watson, Esq., attorney for J. M. Wilson *et al.*

Owing to absence of counsel, adjourned to Friday, March 9th, 1888.

And now, to wit, March 9th, 1888, parties appear and the taking of testimony resumed.

99 Present: Knox & Reed, attorneys for Henry B. Shields *et al.*; D. T. Watson, Esq., attorney for A. M. Byers, adm'r.; Lyon & Shoemaker, attorneys for Mary Montgomery *et al.*; W. M. Watson, Esq., attorney for J. M. Wilson *et al.*; W. L. Chalfant, Esq., attorney for Ebenezer M. McBurney; D. F. Patterson, Esq., attorney for Ebenezer McBurney *et al.*; E. P. & C. W. Jones, attorney for Rob't F. McAuley *et al.*

By D. T. WATSON, Esq., attorney for A. M. Byers, administrator: I offer in evidence the account of the administrator filed in the register's office of the county of Allegheny on the 29th day of January, 1887 (a copy of which account is attached to the plea), and the action of the orphans' court thereon on the 7th day of March, 1887, and the 18th day of March, 1887.

By D. T. WATSON, Esq., attorney for A. M. Byers, administrator: I also offer in evidence the foreign attachment of George T. Jackson against J. M. McAuley, No. 165, April term, 1886, and the judgment thereon entered, and the *scire facias sur garnishment* at No. 3, April term, 1887.

It is agreed by the counsel representing the respective parties in interest in this case that the testimony taken in the estate of Mary McAuley, deceased, in the orphans' court of Allegheny county, at No. 112, March term, 1887, before Hon. J. W. Over, assistant judge, on March 29th, 1887, and subsequent days, be copied by the

100 examiner in this case and admitted in evidence as to the facts of relationship as therein contained, to be considered by the court in the hearing of this case with the same force and effect as if each of the several witnesses had been called and duly examined before this examiner and giving the same testimony.

Testimony.

Doctor JOHN M. MCAULEY sworn.

Examined by Mr. KENNEDY:

I reside in Newark, N. J.; am a clergyman; knew Mary McAuley, the decedent. She lived in my house for many years. She was my first cousin. Her father was John McAuley, and Thomas McAuley, my father, was his full brother. I knew her next of kin on her father's side. She was unmarried. Her father and mother died before her. She left neither brother nor sister surviving her, nor paternal uncles or aunts. She died the 6th day of January, 1886. William McAuley was her father's eldest brother; of his children two are living—Robert Forrest McAuley, Keystone, N. Y.; Mrs. Susan Blakely, East Meredith, N. Y. They were the only children living at her death.

Thomas McAuley, brother to her father, left one child, myself, John M. McAuley, living at his death.

Doctor Samuel McAuley, of New York city, brother to her father, left but one child, Mrs. Margaretta Shears, widow, of New York city, living at her death.

John McAuley's (decedent's father) children died prior to her, leaving no children.

101 James McAuley, a half brother to John McAuley, decedent's father, died leaving two children who survived the decedent, to wit: Mr. James McAuley, of Olathe, Kansas, and Duncan Turner McAuley, of Hancock Co., Illinois.

Her father had two sisters, Eliza Wilson and Mrs. Gillespie. The first died leaving no children and the second died leaving no children surviving decedent.

There are four first cousins of the full blood and two of the half blood on the parental side, viz:

Robert Forrest McAuley, Mrs. Susan Blakely.
John M. McAuley, Mrs. Margaretta Shearers.
James McAuley, Duncan Turner McAuley.
Decedent's mother's maiden name was —— McBurney.

EBENEZER MCBURNEY sworn.

Examined by D. F. PATTERSON:

Knew decedent intimately and her brothers and sisters. None of them survived her, nor did they leave children to survive her. She died without leaving children; was never married. John McAuley was her father, Mary McBurney was her mother; both died prior to her. She left no maternal uncles or aunts surviving her. She left maternal first cousins to survive her.

Alex. McBurney, brother to her mother, left two children surviving her, viz:

Ebenezer M. McBurney, of Ohio, and Mrs. Maria Ash, of Greenfield, Mercer Co., Pa.

James McBurney, brother of her mother, left three children surviving her, viz:

102 Mrs. Sarah Thompson, of Mercer Co., Pa.; Mrs. Catharine Gault, Mercer Co., Pa., and myself, Ebenezer McBurney, of Washington, Pa.

Jane Gillespie, sister to decedent's mother, left one child surviving her, viz:

Eliza Monzingo, Page Co., Iowa.

Martha Mathews, sister to decedent's mother, left one child, viz: Mrs. Martha Crawford, of Peters t'w'p, Washington Co., wife of Andrew Crawford.

Mrs. Mathews had a son, James Mathews, who died latter part of December, 1885, and was buried Jan. 1st, 1886. I was at his funeral. I knew him well.

Decedent left seven maternal first cousins, viz:

Ebenezer Magoffin McBurney. Mrs. Julia Ash.
Ebenezer McBurney. Sarah Thompson.
Catharine Gault. Eliza A. D. Monzingo.
Mrs. Martha Crawford.

Decedent lived in the city of Pittsburgh; died at the Monongahela house.

APRIL 7TH, 1887.

ELIZA PAUL sworn.

Mr. Lyon proposes to prove by the witness the kinship of certain persons who were second cousins to the decedent for the purpose of showing that they are entitled to participate in the distribution.

Messrs. Kennedy & Jones, representing first cousins, object as incompetent and irrelevent; that the offer shows they have no interest in estate and are not entitled to participate in the dis-

103 tribution.

Testimony taken subject to the objection.

Thomas McAuley was the oldest son of Wm. M. McBurney, who was uncle to decedent, and he died without issue.

James McAuley, second son of William, died and left two children, Eliza Egbert and Thomas McAuley.

John, third son of William, is dead, leaving two children (I was raised in William McAuley's family), Mary Montgomery, of Chicago; Margaret Ann Payne, of —

Eliza, daughter of Wm. McAuley, died leaving four children, Eliza Paul, Mary Parker, William Parker, and Jane Stewart.

Ann Campbell, daughter of Wm. McAuley, died leaving six children:

Sarah Hill, New York city; Robert F. Campbell, New York city; Mary Douglass, New York State; Annie McCausland, New York State; James Campbell, Nebraska; Theresa Campbell, Africa.

David, son of Wm. McAuley, died leaving one son, who died leaving two daughters, Susan McAuley and Harriett McAuley.

Examination by Mr. WATSON:

James McAuley, uncle to decedent, had a son.

William McCauley lived in Combright, Delaware Co., N. Y. He died in 1851; had 16 children. I was born in 1822.

MAY 5TH, 1887.

ELIZABETH CALDWELL sworn.

Examined by Mr. MARTIN:

I reside in Allegheny county; am a daughter of James
104 Mathews, deceased; he was a full cousin of decedent and died before her; my father left ten children:

Nancy Jane Ross. Martha Fisher.
Clara Milholland. J. C. Mathews.
Elizabeth Caldwell. L. H. Mathews.
W. A. Mathews. A. L. Mathews.
Sarah McMurray. C. G. Mathews.

All of age; all are living except Mrs. Fisher, who died since decedent.

Mr. Patterson objects to the foregoing testimony as immaterial.

By KNOX & REED, counsel for plaintiff: We offer in evidence assignment of James McAuley, of Olathe, Johnson county, Kansas, of his interest in the estate of Mary McAuley, deceased, to Henry B. Shields, which assignment is dated March 24th, 1887.

We also offer in evidence assignment of Duncan T. McAuley, of Hancock county, Illinois, to Henry B. Shields of all his interest in the estate of Mary McAuley, deceased, dated November 14th, 1887.

It is also admitted by the counsel for the parties hereto that Mrs. Melissa M. Shields is a second cousin of the decedent.

Adjourned to Friday, March 16th, 1888, at 3 o'clock p. m.

105 And now, to wit, March 16th, 1888, parties appear and the taking of testimony resumed.

Present: Messrs. Knox & Reed, attorneys for H. B. Shields *et al.*; Mess. E. P. & C. W. Jones, attorneys for R. F. McAuley *et al.*; Thos. Patterson, Esq., attorney for Home for the Friendless; H. & Geo. C. Burgwin, Esq., attorneys for Home for *the* Aged Protestant Women.

Adjourned to Friday, March 23rd, 1888, at 3 o'clock p. m.

And now, to wit, March 23rd, 1888, parties appear and the taking of testimony resumed.

Present: Knox & Reed, Esqs., att'ys for Henry B. Shields *et al.*; E. P. & C. W. Jones, Esqs., att'ys for R. F. McAuley *et al.*; Lyon & Shoemaker, Esqs., att'ys for Mary Montgomery *et al.*; D. F. Patterson, Esq., attorney for Ebenezer McBurney *et al.*; Thos. Patterson, Esq., att'y for the Home for the Friendless; H. & Geo. C. Burgwin, Esqs., att'ys for the Home for Aged Protestant Women.

HENRY B. SHIELDS, a witness called on behalf of himself and co-plaintiff, being duly sworn, in answer to questions by Mr. J. H. REED, testifies as follows:

Q. Mr. Shields, your wife, Melissa M. Shields, is a relative of Miss Mary McAuley, deceased?

A. Yes, sir.

Q. What relation?

A. Second cousin. Her father and Miss McAuley were cousins.

106 Q. Now, can you trace her lineage back to the common point—her father? What was her father's name?

A. Mathew H. McBurney.

Q. He was a full cousin to Miss Mary McAuley?

A. Yes, sir.

Q. Who was his father? Was the relationship on his father's or mother's side?

A. On his father's side. I think I have a reference to it in my pocket, if you will let me refer to it——

Q. You may refer to it.

A. I find that I have not got the reference with me.

Q. What relation was Alexander McBurney, your wife's grandfather, to Miss McAuley? Can you tell us?

A. No, sir; I do not know.

Q. Now, Mr. Shields, will you state if there are any brother- or sisters of your wife?

A. She has one brother and three sisters.

Q. Give us their names.

A. Clara McBurney, James McBurney, Lelia McBurney, and Mary McBurney.

Cross-examination.

By Mr. THOS. PATTERSON:

Q. Mr. Shields, can you tell us the date of the death of Miss Margaret McAuley?

A. Miss Margaret McAuley (referring to memoranda)—no; it does not give any date here.

It is admitted by counsel that Miss Margaret McAuley died after the death of James McAuley and prior to the 14th day of

107 August, A. D. 1871.

It is admitted on the record by all parties interested that Miss Mary McAuley, deceased, had the fol-owing material first cousins who survived her, to wit:

Ebenezer M. McBurney and Julia Ash, be-ng children of Alexander McBurney, deceased.

Ebenezer McBurney, Sarah Thompson, Catharine Gualt, being children of James McBurney, deceased.

Eliza Monzingo, being a child of Jane McBurney, intermarried with Joseph Gillespie.

Martha Crawford, being a daughter of Martha McBurney, intermarried with James Mathews, now deceased

It is also admitted on the record that Miss Mary McAuley had maternal first cousins deceased prior to her death and who left issues surviving her, said first cousins being William McBurney, James McBurney, Matthews Henderson McBurney, and Maria Byers, being children of Alexander, deceased.

Joseph McBurney, Eliza Hawkins, Martha Watson, being children of James McBurney, deceased.

Matthew Gillespie, Martha Taylor Dick, Hadsah Sloan, being children of Jane McBurney, intermarried with Joseph Gillespie, deceased.

William Mathews and James Mathews, being children of Martha McBurney, intermarried with James Mathews, deceased.

It is further admitted that Miss Mary McAuley had paternal first cousins who survived her as follows, to wit:

Rev. John McAuley, being the son of Rev. Thomas McAuley, deceased.

108 Margaret Shear, being the daughter of Dr. Samuel McAuley, deceased.

Robert F. McAuley and Susan Blakeley, being children of Rev. William McAuley, deceased.

Duncan F. McAuley and James McAuley, being children of Rev. James McAuley, deceased.

It is also further admitted that Miss Mary McAuley had paternal first cousins who died prior to her decease, leaving issue living, said deceased first cousins being as follows:

Letitia Jane McAuley, intermarried with George T. Jackson; Mary McAuley, intermarried with George Farmer, being children of Dr. Samuel McAuley, deceased.

George McAuley, being a son of Rev. James McAuley deceased.

James McAuley, John McAuley, Eliza McAuley, intermarried with — Parker; Ann McAuley, intermarried with William Campbell, and David McAuley, being children of Rev. William McAuley, deceased.

Adjourned to Friday, March 30th, 1888, at 3 o'clock, p. m.

And now, to wit, March 30th, 1888, parties met and the taking of testimony resumed.

Present: Knox & Reed, Esqs., att'ys for plaintiff; H. & Geo. C. Burgwin, Esqs., att'ys for the "Home of Aged Protestant Women;" E. P. & C. W. Jones, Esqs., att'ys for R. F. McAuley, *et al.*

Adjourned to Friday, April 6th, 1888, at 3 o'clock p. m.

109 And now, to wit, April 6th, 1888, parties met and the taking of testimony resumed.

Present: Knox & Reed, Esqs., attorneys for plaintiffs; D. F. Patterson, Esq., attorney for Home for the Friendless; W. M. Watson, attorney for J. M. Wilson *et al.*

It is admitted by counsel for plaintiffs and for defendants as follows:

1st. That Mrs. Rilla Wilson (formerly Rilla McAuley) and Dora McAuley, of Evansville, Illinois, are the only surviving children of George McAuley, deceased, late of Illinois, said George McAuley having died before the death of Miss Mary McAuley, of Pittsburgh; that said George McAuley was a son of Rev. James McAuley, deceased, and was a brother of James McAuley, late of the State of Kansas, deceased, and of Rev. Duncan T. McAuley, of Fruitland, Illinois; that Dr. J. M. Wilson, of Evansville, Illinois, is the husband of said Rilla Wilson.

That said George McAuley, deceased, was a full first cousin of Miss Mary McAuley, late of Pittsburgh, deceased.

2nd. That Mrs. Martha Watson (formerly McBurney) died in 1865, leaving to survive her a husband, Wm. J. Watson, and children.

That at the date of the death of Miss Mary McAuley, of Pittsburgh, the children of said Martha Watson and Wm. J. Watson were (and still are) as follows:

1. Martha Jane, whose husband is William B. McGogney, of Allegheny county, Pa.
2. Katherine Watson, of Philadelphia, Pa.
3. Wilson Stewart Watson, of Mercer county, Pa.
4. Margaret D., whose husband is N. H. Hugus, of Indiana county, Pennsylvania.
5. Dr. William Watson, of Allegheny county, Pennsylvania.
6. Thomas M. Watson, of Birmingham, Alabama.

That said Martha Watson, mother of said children, lived in Lawrence county, Pa., at the time of her death and was a full sister of Ebenezer McBurney, of Washington county, Pennsylvania, and a full sister of Mrs. Kate Gault and of Mrs. Sarah Thompson, both of Lawrence county, Pennsylvania.

That said Martha Watson was a full first cousin of Miss Mary McAuley, late of Pittsburgh, deceased, and a daughter of James McBurney.

3rd. That all of the above-named children of George McAley, deceased, and of Mrs. Martha Watson, deceased, are of full age, and that all the foregoing admission of fact are now made with the same force and effect as if all of said facts had been established by competent testimony before the examiner.

Adjourned to Friday, April 13th, 1888, at 3 o'clock p. m.

And now, to wit, April 13th, 1888, parties appear and the taking of testimony is resumed.

Present: Knox & Reed, Esqs., attorneys for Henry B. Shields *et al.*; E. P. & C. W. Jones, Esqs., attorneys for R. F. McAuley *et al.*; W. M. Watson, Esq., attorney for J. M. Wilson *et al.*; Thos. Patterson Esq., att'y for Home for the Friendless; D. F. Patterson, Esq., attorney for Ebenezer McBurney *et al.*

By THOS. PATTERSON, Esq., counsel for Home for the Friendless: I offer a memorandum from the minute book of the Iron City Na-

tional bank showing the death of James McAuley at half past eight o'clock of the evening of January 9th, 1871.

Adjourned to Tuesday, April 17th, 1888, at 3 o'clock p. m.

And now, to wit, April 17th, 1888, parties appear and the taking of testimony is resumed.

Present: Knox & Reed, Esqs., att'ys for H. B. Shields *et al.*; Thos. Patterson, Esq., att'y for Home for the Friendless; E. P. & C. W. Jones, Esqs., att'ys for R. F. McAuley *et al.*; Lyon & Shoemaker, Esqs., att'ys for Mary Montgomery *et al.*; H. & G. C. Burgwin, Esqs., att'ys for Home for Aged Protestant Women.

COUNSEL FOR HOME FOR AGED PROTESTANT WOMEN: I offer in evidence the act of assembly, approved the 25th day of March, A. D. 1871, Pamphlet Laws, page 452, incorporating the "Home for Aged Protestant Women."

COUNSEL FOR PLAINTIFF: Objected to as incompetent and irrelevant.

Hon. W. G. HAWKINS, recalled as a witness on behalf of the Home for Aged Protestant Women, in answer to questions by Mr.
112 G. C. BURGWIN testifies as follows:

Q. Judge Hawkins, you knew James McAuley?

A. Very well.

Q. What relation did you sustain towards him?

A. His counsel and intimate friend.

Q. Did you have any relations with him in the matter of preparing his will?

A. I drafted it.

Q. Did you discuss the matters contained in his will?

A. Yes, sir; every item. Consultations extended over three or four days, probably.

Q. Did you know the legatees or any of them mentioned in his will?

A. Yes, sir; I knew most of them.

Q. Did you know the legatee named in his will as "Home for Protestant Destitute Women"?

A. Yes, sir.

Q. Where was it located?

A. I think at the time near Wilkinsburg or about to be located there.

Q. At the time of the drafting of the will were any buildings in process of erection by this legatee?

A. No recollection of it. I know that Mr. McAuley took a very great interest in this institution. The two families—the Holmes family and the McAuleys—were very intimate, and for that reason he took especial interest in the home and was a large subscriber, through Miss Jane Holmes; have heard him speak about subscribing to it.

Q. How did he describe it in his conversations with you?

113 COUNSEL FOR PLAINTIFF: Objected to for the reason that conversations between the witness and the testator were confidential communications.

Q. At other conversations than those in which you were advising as counsel?

COUNSEL FOR PLAINTIFF: Objected to as incompetent and irrelevant.

A. My impression is that the name was discussed between us at the time *at the time* of our conversations as to what was the proper designation, and it was, I am satisfied, put down just as I was instructed, and refers to the institution located at Wilkinsburgh.

Q. What identification did you have to locate it besides the name?

A. Well, as I said before, the two families were very intimate—McAuley and Holmes families. Miss Jane Holmes was at the head of this organization or institution. That organization was spoken of frequently in conversations between us.

Q. That is Miss Jane Holmes, who is now the president?

A. Yes, sir; Miss Jane Holmes is the president of the association or institution, or whatever you may call it.

Q. You were the administrator *de bonis non* of the estate of James McAuley, deceased?

A. Yes, sir.

Q. To whom did you distribute the legacy bequeathed by James McAuley to the Home for Destitute Protestant Women?

114 A. My account will show that. I have not looked at it since it was filed. I know I paid it over.

Q. To the home of which Miss Jane Holmes was president?

A. Yes, sir; I never had the slightest doubt but what that was the institution intended.

Q. You also knew Miss Mary McAuley?

A. Very well.

Q. Did you ever have any consultations or conversations with her in regard to the Home for Aged Protestant Women?

A. Frequent conversations about it; that institution and the Home for the Friendless. She took a special interest in both these institutions; frequently talked about them; frequently spoke of Miss Jane Holmes to me in connection with the Home for Destitute Protestant Women, and frequently spoke about having made contributions to those two institutions. She seemed to take a greater interest in these two than in any other and very seldom mentioned any other than these two.

Q. In speaking of the Home for Aged Protestant Women, of which Miss Jane Holmes was president, what name did she give it?

A. No recollection of other name than Home for Destitute Women or Destitute Protestant Women.

Q. How long before James McAuley's death was his will drafted?

A. Well, it was a short time. I do not remember exactly how long. I was several days in drawing the will. I have a very distinct recollection of having to add bequests from day to day. He

would suggest some additional bequest or modify some one already made.

Q. Do you recollect any circumstances especially connected with the legacy for the Home for Protestant Destitute Women?

115 A. Nothing more than I have already stated.

Q. Was there any other persons present while you were discussing the drawing of the will besides yourself and Mr. McAuley?

A. Occasionally his sisters came into the room, but for most part Mr. McAuley and I were alone.

COUNSEL FOR PLAINTIFF: All the foregoing testimony objected to as incompetent and irrelevant.

Cross-examination, none.

Adjourned to Tuesday, April 24, 1888, at 3 o'clock p. m.

And now, to wit, April 24th, 1888, parties appear and the taking of testimony resumed.

Present: Knox & Reed, Esqs., att'ys for H. B. Shields *et al.;* D. F. Patterson, Esq., att'y for Ebenezer McBurney *et al.;* Thos. Patterson, Esq., att'y for Home for the Friendless; H. & G. C. Burgwin, Esqs., *Esqs.*, — for Home for Aged Protestant Women; W. M. Watson, Esq., att'y for J. M. Wilson *et al.;* W. M. Watson, Esq., B. O. Davidson, Esq., att'ys for Elizabeth Carr.

It is admitted by counsel that Mrs. Elizabeth Carr, of Hutchinson, Reno county, Kan., is the only child of Smith Hawkins and Elizabeth Hawkins, said Elizabeth Hawkins' maiden name being Elizabeth McBurney, and a daughter of James McBurney, de-

116 ceased; that said Elizabeth Hawkins, the mother of Mrs. Elizabeth Carr, died about the year 1846, and Smith Hawkins, the father of Mrs. Elizabeth Carr, is also dead.

Miss JANE HOLMES, a witness called on behalf of the Home for Aged Protestant Women, being duly sworn, in answer to questions by Mr. GEO. C. BURGWIN testifies as follows:

Q. You are president of the Home for Aged Protestant Women?
A. Yes, sir.
Q. You were one of the organizers, were you not?
A. Yes, sir.
Q. Where are the buildings?
A. At Wilkinsburg.
Q. When were they commenced?
A. I think we have here a statement——
Q. About the time, with reference to Mr. McAuley's death, was it before he died?
A. Oh, yes; before he died.
Q. Did you know James McAuley?
A. Yes, sir; very intimately for many years.
Q. Did you know Miss Mary McAuley?
A. Yes, sir.

Q. Did you know her well?

A. About as well as almost any person in Pittsburgh—neighbors and intimate friends. I have a little paper here which refers to our house.

Q. Did Mr. McAuley ever in any manner express to you his interest or show his interest in the Home for Aged Protestant Women?

A. Yes, sir; he did.

117 Q. In what manner?

A. He gave us a subscription and at the same time said he would get us other subscribers.

Q. Did he interest himself in getting subscriptions for the home?

A. He did to a certain extent. I called on him at the bank and he put his name down for one thousand dollars, and he told me that Dr. Hostetter was in the president's room, and I said that I did not know Dr. Hostetter and could not ask him to subscribe, but he insisted on my going back and he told Dr. Hostetter my business, and Dr. Hostetter, in the name of Hostetter & Smith, subscribed one thousand dollars. He very pleasantly done this, and I think that would prove that he was in sympathy with this movement.

Q. Did Miss Mary McAuley at any time express to you or show, to your knowledge, any interest in the Home for Aged Protestant Women?

A. She did, from the fact that she gave me $150.00 to furnish a room, and after that on several occasions gave me money. I did not often ask her, as her brother had been so liberal that I felt delicate about asking her. She gave, 1873, December, $150.00; 1875, September, $10.00; 1878, January, $50.00, and 1880, May, $100.00.

Q. This was subscribed through you by Miss Mary McAuley?

A. Yes, sir; given to me for the Home for Aged Protestant Women.

Q. Did Miss McAuley or James McAuley ever talk to you about the home or show any interest in it?

A. Yes, sir; several times during his illness. I saw him sitting in the room, and he would ask me about the home, how we were progressing with our subscriptions; and at one time told

118 me that a friend had been out to see the buildings and had made a favorable report, and that he approved of the buildings, style, &c.

Q. He said that he had sent some one out to see the buildings?

A. Do not know that he had; no, sir.

Q. Some one told him?

A. Yes, sir, and he approved of it.

Q. Did Miss McAuley ever say anything to you with reference to the house in which she lived on Duquesne way?

A. Yes, sir; she told me twice that her brother had said for them never to sell that house—never to sell that house.

Q. That is the same house mentioned in the will of Miss Mary McAuley?

Q. Yes, sir; I suppose so; that was the only real estate she owned.

That was the impression left on my mind that it was her brother's request.

Q. What is the object of the Home for Aged Protestant Women? What sort of aged Protestant women does it provide for?

A. For aged destitute Protestant women.

Q. For aged Protestant women who are destitute?

A. Yes, sir; who are destitute.

Q. How many do you provide for at present?

A. Our number is rather small at present; there is about fifty-two. We have applications for several more. There is room enough for one hundred.

Q. Miss Holmes, I wish to ask you whether you are the Miss Holmes to whom Judge —— paid the legacy given by James Mcley to the Home for Destitute Protestant Women.

119 A. Yes, sir; I suppose so. The money was taken from the Mechanics' bank. My brother had charge of these things. Yes, sir; the money was received and will appear on the treasurer's book and in the report.

By D. F. PATTERSON, Esq.:

Q. Your institution got it at all events?

A. Yes, sir; our institution got the legacy. Miss McAuley evidently approved of it and was in sympathy with it, as she afterwards gave to it.

By GEO. C. BURGWIN, Esq.:

Q. You expressed thanks to Miss Mary McAuley, his sister, for the six-thousand-dollar legacy. Do you recollect what she said?

A. No, sir; I do not, but there were no objections on her part, as she afterwards gave, and she would not have given if she had have had any objections. Mr. McAuley had been very liberal and had always been very pleasant and in the early part gave money and encouraged us.

Q. Do you recollect whether any of these printed reports showing the bequest of James McAuley having been received by the home—whether any of them were handed to Miss Mary McAuley—did she ever read them?

A. I do not know, but they were generally published in the daily papers.

By D. F. PATTERSON, Esq., counsel for Ebenezer McBurney *et al.*:

120 All the foregoing testimony objected to as incompetent and irrelevant.

Cross-examination, none.

Adjourned to Tuesday, May 8th, 1888, at 3 o'clock p. m.

And now, to wit, May 8th, 1888, parties appear and the taking of testimony resumed.

Present: D. F. Patterson, Esq., attorney for Ebenezer McBurney

et al.; W. M. Watson, Esq., attorney for J. M. Wilson *et al.;* E. P. & C. W. Jones, att'ys for Robert F. McAuley *et al.*

Adjourned to May 15th, 1888, at 3 o'clock p. m.

And now, to wit, May 15th, 1888, parties appear and the taking of testimony resumed.

Present: Knox & Reed, Esqs., attorneys for plaintiff-; W. M. Watson, Esq., attorney for J. M. Wilson *et al.*

Adjourned to May 22nd, 1888, at 3 o'clock p. m.

And now, to wit, May 22nd, 1888, parties appear and the taking of testimony resumed.

Present: Knox & Reed, Esqs., attorneys for plaintiffs; D. F. Patterson, Esq., attorney for Ebenezer McBurney *et al.;* Thos. Patterson, Esq., att'y for Home for the Friendless; E. P. & C. W. Jones, att'ys for R. F. McAuley *et al.*

Testimony.

121 In the Circuit Court of the United States for the Western District of Pennsylvania.

SHIELDS *et al.* *vs.* McAULEY *et al.* } No. 19. May Term, 1887. In Equity.

WESTERN DISTRICT OF PENNSYLVANIA:

I, Geo. Motheral, duly appointed by the circuit court of the United States for said district to take and report the testimony in the case stated in the caption, do hereby certify that hereto attached are the proofs for final hearing in said case; that the within-named witnesses appeared before me and were sworn and the testimony taken and reduced to writing by me, and I do further certify that I am not counsel for either of the parties in interest nor in any way interested in the event of said cause.

Witness my hand this 22nd day of May, A. D. 1888, at the city of Pittsburgh, in said district.

GEO. B. MOTHERAL,
Special Examiner.

Filed May 23, 1888.

H. D. GAMBLE, *Clerk.*

122 *Order Fixing Examiner's Fee and Directing Adm'r to Pay the Same.*

In the Circuit Court of the United States for Western District of Pennsylvania.

SHIELDS *et al.* *vs.* McAULEY. } No. 19. May Term, 1887.

And now, to wit, May 24th, 1888, counsel for all parties consenting, the fee of George B. Motheral, examiner, is filed *and* one hun-

dred and twenty-five dollars, and the administrator is directed to pay the same out of funds of the estate of Mary McAuley, deceased.

BY THE COURT.

Filed May 24th, 1888.

H. D. GAMBLE, *Clerk.*

123 *Decree for Account and Appointing Master.*

In the Circuit Court of the United States for the Western District of Pennsylvania.

SHIELDS *et al.* *vs.* MCAULEY *et al.* } No. 19. May Term, 1887.

And now, to wit, May 29th, 1888, this cause came on to be heard on bill, answer, and testimony, and, upon consideration thereof, it is ordered, adjudged, and decreed that an account of the personal estate be stated by Alexander M. Byers, administrator of Mary McAuley, deceased, before Cicero Hasbrouck, Esq., who is hereby appointed master in this case, and that after notice to parties and time given for filing of exceptions to this account the said master is directed to take testimony as to the parties interested in the distribution of the balance in the hands of said administrator and to report said testimony with schedule of distribution to the said court.

BY THE COURT.

Filed May 29, 1888.

H. D. GAMBLE, *Clerk.*

124 *Petition of Elizabeth Carr for Leave to Intervene as Defendant.*

In the Circuit Court of the United States for the Western District of Pennsylvania.

H. B. SHIELDS *et Ux. et al.* *vs.* ROBERT F. MCAULEY *et al.* } No. 19. May Term, 1887. In Equity.

To the Honorable William McKennan, judge of the said court:

The petition of Elizabeth Carr respectfully represents:

First. That your petitioner is the only child of Smith Hawkins and Elizabeth Hawkins, formerly Elizabeth McBurney, and is now married to —— Carr and now resides in Hutchinson, in the State of Kansas.

Second. That your petitioner is about forty-two years of age, and your petitioner's mother died in the year 1846 and petitioner's father died about one and one-half years ago.

Third. That your petitioner's mother was a full sister of Ebenezer McBurney, of Washington county, Pennsylvania, and a full first cousin of Miss Mary McAuley, late of Pittsburgh, Pennsylvania, deceased.

Fourth. That at the above number and term proceedings are pending now before this honorable court for the distribution and settlement of the estate of said Mary McAuley, deceased, and
125 your petitioner has only recently learned of said proceedings, but no notice thereof has been served on your petitioner.

Fifth. That your petitioner claims to be entitled to a distributive share of the estate of said Mary McAuley, deceased, upon final distribution thereof by decree of this hon. court.

Wherefore your petitioner prays:

1st. That your hon. court will make an order allowing your petitioner to become a party defendant to said proceedings.

2nd. That upon the final decree of your hon. court in said proceedings your petitioner be decreed to be entitled to a distributive share of said estate.

3rd. For such other and further relief as to your honors may seem meet and proper and to justice shall appertain.

ELIZABETH CARR,
By WM. M. WATSON,
Her Attorney.

STATE OF PENNSYLVANIA, } ss:
Western District, }

Personally before me came William Watson, of the city of Allegheny, in said district, and one of the defendants in the proceedings at No. 19, May term, 1887, as aforesaid, who, being by me duly sworn according to law, doth depose and say that the statements set forth in the foregoing petition are true and correct, as he is
126 informed and verily believes.

WM. M. WATSON.

Sworn — and subscribed before me this 12th day of June, A. D. 1888.

H. D. GAMBLE, *Clerk.*

And now, to wit, June 12th, 1888, the within and foregoing petition presented, and, upon consideration thereof, the court do grant a rule upon the other parties to the record in said cause to show cause why the prayer thereof should not be granted. Rule returnable Saturday, June 23, 1888.

BY THE COURT.

And now, to wit, June 23, 1888, it appearing to the court that due notice of the within rule has been given to the parties to the record by their attorneys, the court now order and decree that within-named Elizabeth Carr be, and is hereby, made a party defendant to the bill in this case as prayed for in her petition, no objections being made thereto.

BY THE COURT.

Filed June 12, 1888.

H. D. GAMBLE, *Clerk.*

127 *Notice of Order of Court Surpetition of Elizabeth Carr and Proof of Service.*

In the Circuit Court of the United States for the Western District of Pennsylvania.

HENRY B. SHIELDS *et Ux. et al.*
vs.
ROBERT F. MCAULEY *et al.* } No. 19. May Term, 1887. In Equity.

Please take notice that on this day, June 12, 1888, the petition of Elizabeth Carr (formerly Elizabeth Hawkins) was presented to the court praying for leave of court to intervene in the above-entitled case as corespondent.

Whereupon said court has this day granted a rule upon the other parties to the record to show cause why the prayer of said petition should not be granted. Rule returnable on Saturday, June 23, 1888.

WM. M. WATSON,
Att'y for Petitioner.

PITTSBURGH, *June* 12, 1888.

And now, to wit, June 12, 1888, we hereby accept service of above notice and consent that the court may make an order allowing and granting Elizabeth Carr leave to intervene as a codefendant in above case.

H. & C. C. BURGWIN,
Att'ys for Home for Aged Protestant Women.
WM. L. CHALFANT,
Att'y for Ebenezer McBurney.
KNOX & REED,
Att'ys for H. B. Shields et al.
D. F. PATTERSON,
Att'y for Ebenezer McBurney et al.
E. P. JONES,
Att'y for Robert F. McAuley et al.
LYON & SHOEMAKER.
THOS. PATTERSON,
Att'y for Home for the Friendless.

128 JUNE 12, 1888.

Service of above notice accepted.

D. T. WATSON,
For Adm'r.

Filed June 23, 1888.

H. D. GAMBLE, *Clerk.*

Præcipe for Appearance.

In the Circuit Court of the United States for the Western District of Pennsylvania.

H. B. SHIELDS *et Ux. et al.*
vs.
ROBERT F. MCAULEY *et al.*
No. 19. May Term, 1887. In Equity.

Please enter my appearance in above-entitled case for Mrs. Elizabeth Carr, one of defendants.

WM. M. WATSON,
Att'y for Mrs. E. Carr.

To H. D. Gamble, Esq., clerk.

JUNE 23, 1888.

Filed June 23, 1888.

H. D. GAMBLE, *Clerk.*

129 *Master's Report.*

In the Circuit Court of the United States for the Western District of Pennsylvania.

HENRY B. SHIELDS *et al.*
vs.
ROBERT MCAULEY *et al.*
No. 19. May Term, 1887. In Equity.

Master's report.

To the honorable the judges of said court:

The undersigned, appointed master in the above case to pass upon any exceptions which might be filed to the account of Alexander M. Byers, administrator of Mary McAuley, deceased, to take testimony as to the parties interested in the distribution of the balance in the hands of said administrator and to report said testimony with a schedule of distribution to the court, respectfully reports—

That after due notice to the several counsel of record and also by publication for three weeks in the Pittsburgh Dispatch and the Pittsburgh Legal Journal of the time and place of meeting when and where all parties interested would be heard he met at his office, No. 409 Grant street, in the city of Pittsburgh, on the 13th day of June, 1888, and on several subsequent days to which the hearing was adjourned, as shown by the minutes of proceedings before me herewith filed.

Alexander M. Byers, the administrator, has stated his account of the personal estate of said Mary McAuley, deceased,
130 before me, as directed by the order of court, which account consists of a certified copy of his account filed in the orphans' court of Allegheny county, Penna., at No. 112, March term, 1887, together with a "supplemental" account of receipts and expendi-

tures by him since the filing of his account in the orphans' court and up to June 6, 1888.

This is returned herewith, marked "Account, Exhibit No. 1, June 6, 1888."

Notice was duly given by me to all the counsel appearing that exceptions to said account might be filed before me on or before August 2, 1888, as directed by the court.

Exceptions to said account were filed July 28, 1888, by D. F. Patterson, Esq., J. M. McBurney, Esq., and E. P. Jones, Esq., objecting to one item in the supplemental account for accountant's commissions, and also by Wm. M. Watson, Esq., August 2, 1888, objecting to the valuation of the stocks on hand, as contained in Schedule A, annexed to the accounts.

These exceptions are herewith returned and filed.

D. F. Patterson, Esq., and his associates also offered in evidence before me the testimony taken before the examiner and on file in this case for the purpose of showing who are the nearest of kin of said Mary McAuley, deceased, and entitled to share in the distribution.

This testimony and the answer of certain of the defendants on file constitute all the evidence before me on this point and suffi-
131 ciently prove that said Mary McAuley died on the 6th day of January, 1886, unmarried and without issue, leaving neither father nor mother nor brother nor sister nor the issue of any deceased brother or sister nor uncle nor aunt, but only thisteen first cousins, the children of her deceased uncles and aunts hereinafter referred to, and also second cousins, surviving her. This evidence is not disputed.

The administrator, in his account filed in the orphans' court and to which no exceptions are filed, charged himself with all the assets of every kind which had come into his hands according to the valuation contained in the inventory and appraisement, among which was a mortgage for $5,000, and took credit for all moneys paid out by him, and also for his commission at the rate of three per cent. on all the assets which had come into his hands (including said mortgage) at the valuation in the inventory and appraisement, resulting in a balance of $212,235.61 in his hands, which consisted of cash, $107,434.55; bank stocks and other stocks, $89,303.33; the said mortgage for $5,000; a promissory note for $10,000, and some other small items, amounting to $497.75, as shown by Schedule A, annexed to said account.

After the filing of this first account he collected the said mortgage of $5,000, it having been paid to him in cash.

He then filed his supplemental account before me (with a certified copy of the first account), as above stated, wherein he charged
132 himself with dividends on stocks and interest on this same mortgage received by him after filing the first account, and also the $5,000 cash received for said mortgage debt, making his debit in his supplemental account $14,594.50, and took credit for some small sums paid out and also for his commissions on this

$14,594.50 at the rate of five per cent., and stating the balance on his supplemental account at $13,710.78.

Now, on this mortgage he had taken three per cent. commissions in his first account and five per cent. in his supplemental account. This double charge for commissions on this $5,000 was excepted to, as above stated.

This was a clerical error in stating the supplemental account, and I correct it by reducing his commissions $250.

He claims also, in addition to his account stated, a reasonable allowance for the service of his counsel, D. T. Watson, Esq., in this case, and for which I allow him the sum of $250.00. This added to his credits in his supplemental account would still leave the balance $13,710.78.

The other exceptions filed are to the valuation of the stocks on hand, as contained in Schedule A annexed to the account. These are the value thereof taken from the inventory and appraisement filed February 8, 1886.

As to the particular stocks, number of shares of each, and the appraised value thereof remaining in the hands of the administrator *are* given, there is no error in this return by him.

133 But it does not follow that these stocks should be distributed among the parties entitled thereto according to those values. They have risen in value since the appraisement was made in 1886, and the administrator has acted wisely in keeping these stocks and receiving the dividends thereon, thereby largely increasing the shares of the parties in interest. These stocks are probably better than the money for the parties in interest, who would desire a good investment of their shares.

The account shows that 72 shares Iron City National Bank stock, which was appraised at $75 per share, sold in December, 1886, at $85 per share.

One witness, William I. Mustin, called to prove values, states, in his opinion, the present values of all these stocks much above the appraised rates in the inventory. (Minutes, p. 4.)

These stocks can be distributed among the parties by giving to each a proportionate share of each kind, so whether valued too high or too low, in our estimate, all parties will fare alike.

The stocks are as follows:

502 shares Iron City National bank, appraised in inventory at $75 per share	$37,650 00
119 shares Mechanics' National bank, appraised in inventory at $80 per share	9,520 00
250 Citizens' Passenger Railway Co., appraised in inventory at $83⅓ per share	20,833 33
134 250 Allegheny Bridge Co., appraised at $50 per share	12,500 00
220 Pittsburgh Gas Co. at $40 per share	8,800 00
Making total appraised value	$89,303 33

The 250 shares of Citizens' Passenger Railway Co. stock have been exchanged by order of court for and converted into 1,750 shares of Citizens' Traction Company stock.

Considering the appraised value of these stocks, made nearly three years ago, the price at which the 72 shares of Iron City National Bank stock sold nearly two years ago, and the testimony of Mr. Mustin, the only witness called as to their value, I find the present value of these stocks to be as follows:

502 shares Iron City National bank at $86 per share	$43,172 00
119 shares Mechanics' National bank at $90 per share	10,710 00
1,750 shares Citizens' Traction Company at $42 per share	73,500 00
250 Allegheny Bridge Company at $65 per share	16,250 00
220 Pittsburgh Gas Company at $60 per share	13,200 00
Making total present value	$156,832 00
And the gain by the rise in value of these stocks	$67,528 67

As to the question who are entitled to share in the distri-
135 bution of the personal estate of said Mary McAuley, deceased, I am of opinion that her thirteen first cousins hereinafter named are entitled to share equally in the distribution, to the exclusion of second cousins, and for the following reasons:

Under the Pennsylvania act of 8th April, 1883, relating to intestates (Brightly's Purdon's Digest, page 931, sec. 24), first cousins take as next of kin of the decedent, and consequently to the exclusion of second cousins.

And under that act they took *per capita* and *per stirpes*. If any other authority than the act itself on this point were needed it may be found in Brenneman's Appeal, 40 Pa. St. R., 115, and Hayes' Appeal, 89 Pa. St. R., 256.

Then came the act of 27th April, 1855 (Purd. Dig., 932, sec. 26), which enacts that "among collaterals, when by existing laws entitled to inherit, the real and personal estate shall descend and be distributed among the grandchildred of brothers and sisters and the children and aunts by representation, such descendants taking equally among them such share as their parent would have taken if living."

This act did not extend to nor include second cousins (grandchildren of uncles and aunts) so as to enable them to inherit along with first cousins.

It only changed the law as to children of uncles and aunts (first cousins) by enabling them to inherit *per stirpes*, instead of *per capita* as before. (Brenneman's Appeal, *supra*.)

136 Then again came the act of 30th June, 1885 (Purd. Dig., sup., 2225, sec. 12), which enacted that "whenever real and personal estates shall descend to or be distributed among several persons, whether lineal or collateral heirs or kindred, standing in the same degree of consanguinity to the intestate, if there shall be only one of such degree, he shall take the whole of such estate;

and if there be more than one they shall take in equal shares; and, if real estate, shall hold the same as tenants in common."

This act repealed all former acts or parts of acts inconsistent therewith.

The effect of this was to restore the provisions of the act of 1833 as to those standing in the same degree, so that first cousins would take *per capita*, and not *per stirpes*, as under the act of 1855.

We need not refer to the act of 25th May, 1887, on this subject, as it was passed after death of Mary McAuley, and therefore can have no bearing on the question in this case.

Second cousins have no interest whatever in this estate of Mary McAuley, and they should not have joined, either as plaintiffs or defendants, in this proceeding.

Mary McAuley died on the 6th day of January, 1886, intestate as to her personal estate, unmarried and without issue, her nearest relatives being first cousins, the children of her deceased
137 paternal uncles and of her deceased maternal uncles and aunts, as follows:

First. Rev. John M. McAuley (or John M. Macauley, as he writes his name), the only surviving child of Rev. Thomas McAuley, deceased, who was a brother of decedent's father, John McAuley, deceased.

Second. Margaret Shear, the only surviving child of Samuel McAuley, deceased, who was likewise a brother of decedent's father.

Third. Robert F. McAuley and Susan Blakeley, children of Rev. William McAuley, deceased, who was also a brother of decedent's father.

Fourth. Duncan T. McAuley and James McAuley, children of Rev. James McAuley, deceased, who was a brother of the half blood of decedent's father.

Fifth. Ebenezer M. McBurney and Julia Ash, children of Alexander McBurney, deceased, who was a brother of decedent's mother, Mary McBurney, deceased.

Sixth. Ebenezer McBurney, Sarah Thompson, and Catharine Gault, children of James McBurney, deceased, who was also a brother of decedent's mother.

Seventh. Eliza Monzingo, only surviving child of Jane Gillespie, deceased, who was a sister of decedent's mother.

Eighth. Martha Crawford, only surviving child of Martha Matthews, deceased, who was also a sister of decedent's mother.

138 I therefore distribute the money and these stocks equally among these thirteen first cousins of the decedent, giving to each an equal share of the money and of the stocks as near as possible.

Where any share or part of a share has been assigned or transferred by operation of law, as by attachment or otherwise, it is noted and distributed to the present owner.

I also include in this distribution with these stocks those items in the inventory and schedule annexed to the account, consisting of decedent's pictures, clothing, piano, articles of jewelry, &c., together amounting to $497.75, as per inventory and appraisement.

These small articles I allot to one of the parties at their appraised

value, and if they are desired to be shared by others as mementoes of the deceased I doubt not the one to whom they are awarded will divide them at cost with those who may wish to share in them.

Amount of stocks at present values as above stated	$156,832 00
Personal effects of decedent as above	497 75
Amount of stocks, &c., for distribution	$157,329 75
Each first cousin's share of stocks, &c.	$12,102 29

With the dividends thereon payable after June 6, 1888, the close of the supplemental account.

139	Amount of cash as per first account	$107,434 53
	Amount of cash as per supplemental account	13,710 78
	Total amount of cash	$121,145 31
	Deduct amount applicable to cost, &c.	714 18
	Amount of cash for distribution to 13 cousins	$120,431 13

$\frac{1}{13}$ of this—$9,263.93, $\frac{4}{13}$ each share—

$12,102 29, stocks.
9,263 93, cash.

$21,366 22, each share of stocks and cash.

Besides the above stocks, &c., and cash, which are susceptible of division at the present time in the manner above indicated, there remains in the hands of the administrator, A. M. Byers, the "one promissory note" for $10,000 above mentioned, which is the note of George R. Duncan, lately deceased, and it is admitted by the counsel that said note is probably uncollectable.

It is proper that it should remain in the hands of the administrator until the estate of said George R. Duncan, deceased, can be settled, and whatever can be recovered on it from his estate must then be accounted for, and the proceeds thereof, after deducting expenses of collection, &c., will be divided among the said thirteen first cousins or their assigns.

There will also probably be in the administrator's hands to be accounted for hereafter the interest accruing on his bank
140 deposits of the money in his hands up to the time he shall pay out the same.

In his first account, filed January 29, 1887, he charged himself as of that date with "interest on bank balances" to that time at two per cent. per annum, making $2,112.66. In his supplemental account filed before me June 6, 1888, he does not charge himself with any such interest, although another year had elapsed, and if he had continued to receive interest on the "bank balances," as before, a like or larger sum would probably have accrued. The omission of this in his supplemental account was probably an oversight, but, as he will probably continue to receive such interest on the fund until it is paid out by him to the parties entitled, it will then be accounted for by him, together with whatever may be recovered

on Duncan's note. These two items, the note for $10,000 and the interest accruing after January 29, 1887, on the money in his hands, cannot be divided at present, but must remain to be accounted for hereafter.

The money and stocks, however, should be paid to the parties entitled thereto without further delay.

Duncan T. McAuley and James McAuley have assigned all their interests in this estate to Henry B. Shields, one of the plaintiffs, who now holds these two shares (Ev., p. 53).

The share of Rev. John McAuley (or Macauley as he writes his name) was attached in the hands of the administrator, by a foreign attachment, February 8, 1886, at the suit of George T. Jackson, at No. 165, April term, 1886, in the court of common pleas No.
141 2, of Allegheny county, Pa., as appears by the record of that case offered in evidence before me, being a suit on a promissory note of said John M. Macauley dated May 16, 1884, for $4,737.00, wherein judgment was obtained January 3, 1887, against Rev. John M. Macauley, the defendant, for the amount of said note, $4,737.00, and interest thereon from May 18, 1884, to January 3, 1887, $746.08, making $5,483.08, with costs.

By a clerical error this judgment is stated on exemplification furnished me at $5,583.08, but an examination of the whole record, and particularly the liquidation filed, shows the true amount to be $5,483.08, with costs of suit.

Rev. John M. Macauley also assigned to said George T. Jackson, April 29, 1886, by writing of that date, offered in evidence before me, so much of his share in this estate as would pay that debt.

George T. Jackson is thus entitled to the amount of that judgment to be paid out of the money coming to this share.

Rev. John M. Macauley also by writing, same date, April 29, 1886, offered in evidence before me, assigned his share in this estate, after paying the said claim of George T. Jackson, to pay a debt of $7,500.00 to Lostitia Ida Jones, and also a debt of $6,500.00 to Caroline Van Wyck, and the balance to Ida Macauley, and authorized the administrator to pay out his share accordingly.

By these several assignments this share is to be distributed as follows:

142

To George T. Jackson's judgment, No. 165, April term, 1886, debt		$5,483 08
Interest from January 3, 1887, to October 3, 1888		575 71
Costs of Allegheny county	$18 00	
Costs, record (copy)	4 90	
		22 90
		$6,081 69
To Lostitia Ida Jones		7,500 00
" Caroline Van Wyck		6,500 00
" Ida Macauley, the balance		1,284 53
Making Rev. John M. Macauley's full share of cash and stocks		$21,366 22

I therefore report the following:

Schedule of Distribution.

First—of cash:

Amount of cash on hand June 6, 1888		$121,145 31
To costs in this case—Clerk	$32 00	
Marshall	40 18	
Examiner	125 00	
Master's fee	500 00	
Paid ads.	17 00	
		714 18
		$120,431 13

$\frac{1}{13}$ of this, $9,263.93, each share of cash.

Second—of stock, &c.:

For distribution		$157,329 75
Each share $\frac{1}{13}$ of this	$12,102 29	

1. To Rev. John M. Macauley's assignees, to wit:

143 George T. Jackson judgment, No. 165, April term, 1886, debt		$5,483 08
Interest		575 71
Costs, Allegheny county		22 90
		$6,081 69
To Lostitia Ida Jones		1,560 00
" Caroline Van Wyck		1,422 00
Ida Macauley		30 78
		$9,094 47
Balance on stocks		169 46
Full share of cash		$9,263 93

To Lostitia Ida Jones:

20 shares Iron City National bank stock @ $86	$1,720 00	
5 shares Mechanics' National bank stock @ 90	450 00	
60 shares Citizens' Traction Company stock @ $42	2,520 00	
10 shares Allegheny Bridge Company stock @ $65	655 00	
10 shares Pittsburgh Gas Company stock @ $60	600 00	
	$5,940 00	$5,940 00

To Caroline Van Wyck:

18 shares Iron City National bank stock @ $86	$1,548 00	
4 shares Mechanics' National bank stock @ $90	360 00	
50 shares Citizens' Traction Company stock @ $42	2,100 00	
10 shares Allegheny Bridge Company stock @ $65	650 00	
7 shares Pittsburgh Gas Company stock @ $60	420 00	
	$5,078 00	$5,078 00

144 To Ida Macauley:

18 shares Citizens' Traction Company at $42	$756 00	
Sundry items in Schedule "A," amounting to	497 75	
	$1,253 75	$1,253 75
Amount of stocks applied to this share	$12,271 75	$12,271 75
Excess over share ($12,102.29), deducting from cash	169 46	169 46
Full share ($\frac{1}{13}$) of stocks	$12,102 29	$12,102 29

2. To Henry B. Shields, assignee of Duncan T. McAuley:

1. Of cash one share ($\frac{1}{13}$)	$9,263 03	
Less balance on stocks	7 71	
		$9,256 22
2. Of stocks:		
38 shares Iron City National bank @ $86	$3,268 00	
9 " Mechanics' National bank " 90	810 00	
136 " Citizens' Traction Company @ $42	5,712 00	
20 " Allegheny Bridge Company @ $65	1,300 00	
17 " Pittsburgh Gas Company @ $60	1,020 00	
		$12,110 00

3. To Henry B. Shields, assignee of James McAuley:

1. Of cash one share ($\frac{1}{13}$)	$9,263 93	
Less balance on stocks	7 71	
		$9,256 22

2. Of stocks:

38 shares	Iron City National bank @ $86	$3,268 00		
9 "	Mechanics' National bank " 90	810 00		
136 "	Citizens' Traction Company @ $42	5,712 00		
20 "	Allegheny Bridge Company @ $65	1,300 00		
17 "	Pittsburgh Gas Company @ $60	1,020 00		
				$12,110 00
145	4. To Robert F. McAuley:			
	1. Of cash one share ($\frac{1}{13}$)	$9,263 93		
	Less balance on stocks	7 71		
				$9,256 22
	2. Of stocks:			
38 shares	Iron City National bank @ $86	$3,268 00		
9 "	Mechanics' National bank " 90	810 00		
136 "	Citizens' Traction Company @ $42	5,712 00		
20 "	Allegheny Bridge Company @ $65	1,300 00		
17 "	Pittsburgh Gas Company @ $60	1,020 00		
				$12,110 00
	5. To Margaret Shear:			
	1. Of cash one share ($\frac{1}{13}$)	$9,263 93		
	Less balance of stocks	7 71		
				$9,256 22
	2. Of stocks:			
38 shares	Iron City National bank at $86	$3,268 00		
9 "	Mechanics' National bank " 90	810 00		
136 "	Citizens' Traction Company at $42	5,712 00		
20 "	Allegheny Bridge Company at $65	1,300 00		
17 "	Pittsburgh Gas Company at $60	1,020 00		
				$12,110 00
	6. To Susan Blakeley:			
	1. Of cash one share ($\frac{1}{13}$)	$9,263 93		
	Less balance on stocks	7 71		
				$9,256 22
	2. Of stocks:			
38 shares	Iron City National bank at $86	$3,268 00		
9 "	Mechanics' National bank " 90	810 00		
136 "	Citizens' Traction Company at $42	5,712 00		
20 "	Allegheny Bridge Company at $65	1,300 00		
17 "	Pittsburgh Gas Company at $60	1,020 00		
				$12,110 00

146 7. To Ebenezer M. McBurney:

1. Of cash one share ($\frac{1}{113}$)	$9,263 93	
Less balance on stocks	7 71	
		$9,256 22
2. Of stocks:		
38 shares Iron City National bank at $86	$3,268 00	
9 " Mechanics' National bank at $90	810 00	
136 shares Citizens' Traction Company at $42	5,712 00	
20 shares Allegheny Bridge Company at $65	1,300 00	
17 shares Pittsburgh Gas Company at $60	1,020 00	
		$12,110 00

8. To Ebenezer McBurney:

1. Of cash one share ($\frac{1}{113}$)	$9,263 93	
Less balance on stocks	7 71	
		$9,256 22
2. Of stocks:		
38 shares Iron City National bank at $86	$3,268 00	
9 " Mechanics' National bank at $90	810 00	
136 " Citizens' Traction Company at $42	5,712 00	
20 " Allegheny Bridge Company at $65	1,300 00	
17 shares Pittsburgh Gas Company at $60	1,020 00	
		$12,110 00

9. To Julia Ash:

1. Of cash one share ($\frac{1}{113}$)	$9,263 93	
Less balance on stocks	7 71	
		$9,256 22
2. Of stocks:		
38 shares Iron City National bank at $86	$2,268 00	
9 " Mechanics' National bank at $90	810 00	
136 " Citizens' Traction Company at $42	5,712 00	
20 " Allegheny Bridge Company at $65	1,300 00	
17 " Pittsburgh Gas Company at $60	1,020 00	
		$12,110 00

147 To Sarah Thompson:

1. Of cash one share ($\frac{1}{113}$)	$9,263 93	
Less balance on stock	7 71	
		$9,256 22

2. Of stocks:

38 shares	Iron City National bank at $86	$3,268 00	
9 "	Mechanics' National bank at $90	810 00	
136 "	Citizens' Traction Company at $42	5,712 00	
20 "	Allegheny Bridge Company at $65	1,300 00	
17 "	Pittsburgh Gas Company at $60	1,020 00	
			$12,110 00

11. To Catharine Gault:

1. Of cash one share ($\frac{1}{13}$)	$9,263 93	
Less balance on stocks	7 71	
		$9,256 22

2. Of stocks:

38 shares	Iron City National bank at $86	$3,268 00	
9 "	Mechanics' National bank at $90	810 00	
136 "	Citizens' Traction Company at $42	5,712 00	
20 "	Allegheny Bridge Company at $65	1,300 00	
17 "	Pittsburgh Gas Company at $60	1,020 00	
			$12,110 00

12. To Eliza Monzingo:

1. Of cash one share ($\frac{1}{13}$)	$9,263 93	
Add for deficiency on stocks	195 29	
		$9,459 22

2. Of stocks:

42 shares	Iron City National bank at $86	$3,612 00	
10 "	Mechanics' National bank at $90	900 00	
130 "	Citizens' Traction Company at $42	5,460 00	
15 "	Allegheny Bridge Company at $65	975 00	
16 "	Pittsburgh Gas Company at $60	960 00	
			$11,907 00

148 13. To Martha Crawford:

1. Of cash one share ($\frac{1}{13}$)	$9,263 93	
Add for deficiency on stocks	51 29	
		$9,315 22

2. Of stocks:

42	shares	Iron City National bank at 86	$3,612 00	
10	"	Mechanics' National bank at $90	900 00	
132	"	Citizens' Traction Company at $42	5,544 00	
15	"	Allegheny Bridge Company at $65	975 00	
17	"	Pittsburgh Gas Company at $60	1,020 00	
				$12,051 00

All which is respectfully submitted.

C. HASBROUCK, *Master.*

November 1, 1888.
Filed November 1, 1888.

H. D. GAMBLE, *Clerk.*

Minutes of Proceedings Before the Master.

In the Circuit Court of the United States for the Western District of Pennsylvania.

HENRY B. SHIELDS *et al.* *to* ROBERT F. MCAULEY *et al.* } No. 19. May Term, 1887. In Equity.

JUNE 6, 1888—3 o'clock p. m.

After notice to Alexander M. Byers, administrator *c. t. a.* of the estate of Mary McAuley, deceased, to state his account before me and notice to other counsel there met before me this day D. T. Watson, Esq., solicitor for Alexander M. Byers, adminis-
149 trator, &c.; also Alex. M. Byers in person, J. H. Reed, Esq., of Knox & Reed, solicitors for plaintiffs; D. F. Paterson, Esq., solicitor for (see record); E. P. Jones, solicitor for (see record).

D. T. Watson, Esq., offers the account of Alexander M. Byers, administrator, &c., filed before the register of Allegheny county, advertised by the register and confirmed *nisi* by the orphans' court on March 7, 1887, and absolutely on March 18, 1887.

This account shows the balance in the hands of the administrator, as per schedule annexed to account, of $212,235.61 (Exhibit No. 1); also offers supplemental marked Exhibit No. 2, which shows that since the first account the administrator has received in cash $14,594.50, made up as follows: $9,594.50, interest and dividend, on stock of decedent shown on schedule, and $5,000 is the principal of a mortgage of George R. Duncan, which appears in the schedule annexed to first account as mortgage on real estate $5,000. The monies paid out since filing the first account amount to $154, as shown in the supplemental account.

The administrator, in his supplemental account, asks for an allowance for monies passing through his hands since filing first account, $729.72. D. T. Watson, Esq., for Alex. M. Byers, administrator, &c.,

claims a reasonable allowance for counsel fees for services rendered since filing the first account.

Adjourned to meet June 13 inst., at 3 o'clock p. m.

Notice of meeting, June 13, at 3 p. m., given to attorneys and service accepted by them.
See paper signed by them.

150 JUNE 13, 1888.

Met at 3 p. m.
George C. Burgwin, Esq., appears for "The Home for Aged Protestant Women."
Walter Lyon, Esq., appears for Mary Montgomery, Joseph A. Montgomery, Margaret Ann Payne, Dexter C. Payne, Eliza Paul, Eli Paul, Mary Parker, Jane Stewart, John A. Stewart, William M. Parker, Sarah Hill, and Robert F. Campbell.
William M. Watson, Esq., appears for Dora McAuley, Dr. J. M. Wilson, and Rilla Wilson, his wife; Martha Jane McGogney and William B. McGogney, her husband; Margaret P. Hugus and N. H. Hugus, her husband; Catharine Watson, Dr. William Watson, James M. Watson, Wilson Stewart Watson, and Thomas M. Watson.
D. F. Patterson, Esq., appears for Ebenezer M. McBurney, Sarah Thompson, Catharine Gault (sued as Kate Gault), Eliza Monzigo (sued as Mrs. Zanningo), and Martha Crawford.
James H. Reed, Esq., appears for all the plaintiffs.

Adjourned to next Monday, June 18, at 3 p. m.

E. P. & C. W. Jones appeared for Margaretta Shear, Robert F. McAuley, and Mrs. Susan Blakeley.

JUNE 18TH, 1888.

Met at 3 p. m.
E. P. Jones, Esq., appears.
Wm. M. Watson, Esq., appears.
W. L. Chalfant, Esq., appears for Ebenezer McBurney.
Thomas Patterson, Esq., appears for "Home of the Friendless."
Adjourned to June 28th, at 3 p. m.

JUNE 28TH, 1888.

Met at 3 o'clock p. m.
151 D. F. Patterson, Esq., appears for whom his appearance is entered.
E. P. Jones, Esq., appears for whom his appearance is entered.
And now, June 28th, 1888, ordered that exceptions to the account of Alexander M. Byers, administrator of Mary McAuley, dec'd, may be filed before me at any time on or before the 2nd day of August next.

Adjourned to Thursday next, July 5th, at 3 p. m.

July 5, 1888.—No one appearing, adjourned to Saturday, July 28th, inst., at 10 o'clock a. m., the time fixed for meeting by notice published in the Pittsburgh Daily Dispatch and the Pittsburgh Legal Journal.

In the Circuit Court of the United States for the Western District of Pennsylvania.

HENRY B. SHIELDS *et al.*
vs.
ROBERT F. MCAULEY *et al.* } No. 19. May Term, 1887. In Equity.

The undersigned, appointed master in the above case to receive and pass upon the account of Alexander M. Byers, administrator of the estate of Mary McAuley, late of the city of Pittsburgh, deceased; to take testimony as to the parties interested in the distribution, and to report a schedule of distribution of the balance in the hands of said administrator, will attend to the duties of said appointment at his office, No. 409 Grant street, in the city of Pittsburgh, on Saturday, the 28th day of July, 1888, at 10 o'clock a. m., when and where all parties interested in the
152 distribution of said estate will attend.

June, 1888.

C. HASBROUCK, *Master.*

In the Circuit Court of the United States for the Western District of Pennsylvania.

HENRY B. SHIELDS *et al.*
vs.
ROBERT F. MCAULEY *et al.* } No. 19. May Term, 1887. In Equity.

The undersigned, appointed master in the above case to receive and pass upon the account of Alexander M. Byers, administrator of the estate of Mary McAuley, late of the city of Pittsburgh, deceased; to take testimony as to the parties interested in the distribution, and to report a schedule of distribution of the balance in the hands of said administrator, will attend to the duties of said appointment at his office, No. 409 Grant street, in the city of Pittsburgh, on Saturday, the 28th day of July, 1888, at 10.00 a. m., when and where all parties interested in the distribution of said estate will attend.

C. HASBROUCK, *Master.*

JULY 28, 1888.

Met at 10 o'clock a. m.
D. F. Patterson, Esq., appears for —. See appearance.
J. M. McBurney, Esq., " " " "
E. P. Jones, Esq., " " " "

D. F. Patterson, Esq., and J. M. McBurney, Esq., and E. P.
153 Jones, Esq., attorneys for the parties they represent, file exceptions to the administrator's account as to commissions on $5,000 claimed. *Pro ut* same, paper filed.

They further object to the allowance claimed by the administrator's counsel for professional services rendered since the filing the first account.

Same counsel offer in evidence the testimony taken before J. B. Motherall, examiner, in this case, on file in this case, for the purpose of showing who are the next of kin of Miss Mary McAuley, deceased, and entitled to share in the distribution in this case, and they claim that first cousins are entitled to the exclusion of second cousins of the decedent.

Adjourned to Thursday next, August *next*, at 2 p. m.

AUGUST 2, 1888.

Met at 2 p. m.

Exceptions to the account of A. M. Byers, adm'r, filed by Wm. M. Watson, Esq., on behalf of Dora McAuley *et al.* (Sent to me by mail from Washington, Penna.)

No one appearing, adjourned to August 9th, at 2 p. m.

AUGUST 9, 1888.

No one appearing, adjourned to Sept. 6 (Thursday), at 2 o'clock p. m.

SEPTEMBER 6, 1888.

Met at 2 o'clock p. m.

E. P. Jones, Esq., appears for those represented by him.

D. F. Patterson, Esq., " " " " " "

Adjourned to Thursday, Sept. 13, 1888, at 2 o'clock p. m., for final hearing unless cause be shown for a further continuance.

154 Notice to D. T. Watson, Wm. M. Watson, Knox & Reed, — Walter Lyon.

SEPTEMBER 13, 1888

Met at 2 o'clock p. m.

D. T. Watson, Esq., appears for adm'r.

D. F. Patterson, Esq., " " " (See minutes.)

E. P. Jones, Esq., " " " " "

John M. Kennedy, Esq., appears for Rev. John M. McAuley, D. D., and also for Ida McAuley, his assignee.

DAVID T. WATSON, Esq., sworn.

Examined by Mr. JONES:

I am counsel for Robert F. McAuley, adm'r, and have been since letters of administration were granted. The usual publication to creditors, &c., was made. All the debts of decedent have been paid of which I have any knowledge.

The decedent was an elderly maiden lady not engaged in business, and only debts presented were some personal bills, as for boarding, &c.

D. T. Watson, Esq., offers Record No. 165, April term, 1886, common pleas No. 2, Allegheny Co., Pa., showing a foreign attachment, attaching the interest of Rev. John M. McAuley, at the suit of George Jackson, and judgment January 3, 1887, for $5,583.08.

Int. from January 3, 1887.

Costs, Allegheny Co., $18.00.

Exemplification of record, $4.90.

155 John M. Kennedy, Esq., offers assignment by Rev. John M. McAuley to Ida McAuley, dated April 29, 1886, of balance of interest, &c. See papers held by Mr. Kennedy.

Mr. Watson offers assignment of Rev. John M. McAuley to George T. Jackson for an interest, to wit, $4,737, with interest from May 16, 1884, same debt as the judgment in the foreign attachment. (See paper.)

It is admitted by the counsel now present that the "one promissory note," $10,000.00, in the schedule of effects annexed to the account, is a note of George R. Duncan, deceased, for that amount, and is probably uncollectable.

The counsel present consent to allowance to the administrator for fee for his counsel for services since the filing of his accounts in the orphans' court of $250.00.

Hearing closed September 13, 1888.

September 14, 1888.—Walter Lyon, Esq., and Wm. M. Watson, Esq., appear before me and ask to be further heard on the question of the right of second cousins to inherit along with first cousins, and Friday, the 21st inst., at 2 o'clock, is fixed for hearing them.

Sept. 21st, 1888.—Walter Lyon, Esq., Wm. M. Watson, and J. H. Reed, Esq., appear and ask further time; whereupon Friday, Sept. 28, 1888, at 2 p. m., is fixed for hearing them on said question. Same day, Sept. 21st, 1888.—William J. Mustin called as witness and examined by Mr. Lyon as to value of stock as follows:

156 WILLIAM I. MUSTIN sworn.

Examined by Mr. LYON:

I am a stock broker, a member of the firm of George B. Hill & Co., Pittsburgh, and am acquainted with the value of stocks, &c. The following-named stocks are of the following market values respectively:

Iron City National Bank of Pittsburgh,	$88.00	per	share.
Mechanics' National Bank of Pittburgh,	100.00	"	"
Allegheny Bridge (Suspension), "	70.00	"	"
Pittsburgh Gas Company, "	65.00	"	"
Citizens' Traction Company, "	47.00	"	"

These are what these stocks should sell for to-day in the market and are slightly conservative.

Sept. 28, 1888.—This being the day fixed for hearing counsel on the question of the right of second cousins to inherit in this case,

and neither Walter Lyon, Esq., nor Wm. M. Watson, Esq., nor J. H. Reed, Esq., nor any other one appearing, the hearings are again closed.

Oct. 3rd to Nov. 1, 1888.—Report made out and printed.

Oct. 20, 1888.—Wm. M. Watson, Esq., argued the above question before me for second cousins.

G. HASBROUCK, *Master.*

Nov. 1, 1888.

Filed Nov. 1, 1888.

H. D. GAMBLE, *Clerk.*

157 ACCOUNT, EXHIBIT No. 1.

First and Partial Account of Alexander M. Byers, Administrator C. T. A. of the Estate of Mary McAuley, Deceased.

Said accountant charges himself with the appraised value of all the items comprising said estate as shown in the inventory and appraisement filed February 8, 1886, and also with the income derived therefrom to January 29, 1887, and also with gain or stocks and other effects of and belonging to the said estate sold over and above their appraised value, to wit:

1886.				
Feb.	8.	Net amount of inventory and appraisement filed		$220, 585 83½
		Income:		
Mar.	18.	Dividend from Mechanics' National bank	$297 50	
"	"	" " " " "	297 50	
"	"	Dividend from Citizens' Passenger Railway Co.	625 00	
"	"	Dividend from Allegheny Bridge Company	437 50	
"	"	" " " "	500 00	
"	"	Interest on promissory note for $5,000.00	325 00	
May	31.	Dividend from Citizens' Passenger Railway Co.	625 00	
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"	"	Dividend from Iron City National bank	1, 148 00	
Nov.	20.	Dividend from Iron City National bank	1, 148 00	
Dec.	13.	Dividend from Mechanics' National bank	297 50	
"	"	Dividend from Citizens' Passenger Railway Co.	500 00	
"	"	Dividend from Allegheny Bridge Company	437 50	
"	"	Dividend from Pittsburgh Gas Company	330 00	
"	"	" " " "	330 00	
1887.				
Jan.	14.	" " " "	330 00	
"	"	Dividend from Mechanics' National bank	297 50	
"	"	Dividend from Allegheny Bridge Company	500 00	
"	29.	Interest on bank balance to this date, at 2 % per annum	2, 112 66	
"	"	Dividend, July, 1885, from Pittsburgh Gas Co.	330 00	
				$10, 868 66
		Gains:		
1886.				
May	1.	On inventory sold as follows:		
"	"	One pair diamond earrings, sold for $75; appraisment, $70	5 00	
		One clustre diamond pin, sold for $40.00; appraisement, $35	5 00	

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		One large solitaire diamond ring, sold for $35; appraisement, $30.00	5 00	
Dec.	20.	On 72 shares Iron City National bank, sold as $85 per share; appraised value, $75	720 00	
				$735 00
		Forward		$232,189 49½
		Amount brought forward		$232,189 49½
		The said accountant takes credit as follows: For payments made on account of said estate, to wit:		
1886.				
Jan.	6.	Obituary notices in the following newspapers: "Penny Press," "Dispatch," "Commercial Gazette," "Post," "Times," "Leader," "Chronicle-Telegraph," $1.50 each	$10 50	
"	"	Moving furniture at Monongahela house	3 00	
"	25.	Mrs. Mary Orr's bill of washing for deceased	2 00	
Feb.	9.	Andrew Fleming, M. D., professional services	10 00	
"	18.	H. B. Orr, M. D., " "	15 00	
		Expenses incident to the decease and burial of Miss Mary McAuley, as per Schedule "B," hereto attached	95 96	
Mar.	18.	H. Samson, undertaker	579 00	

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Mar.	18.	Notice of administrator, Commercial Gazette	8 00	
"	"	Ditto, Chronicle-Telegraph	6 00	
"	"	George S. Griscom, rooms, &c., for deceased at the Monongahela house, Pittsburgh	228 16	
"	"	Register's fees, $15.00, and swearing appraisers, 50c.	15 50	
Apr.	5.	Peter Dressler, coroner's fees	15 00	
"	6.	Collateral inheritance tax	9,855 71	
"	7.	William McKibben, professional services	100 00	
June	5.	J. Rogers, M. D., " "	5 00	
Dec.	29.	H. Kleber & Bro., storage on piano	22 00	
1887.				
Jan.	27.	D. T. Watson, professional services	1,800 00	
		Accountant's commission, 5 %, on income derived from the estate to Jan'y 29, 1887, $10,868.66	543 43	
		Accountant's commission on appraised value of the estate and gains on appraisement, $221,320.83½	6,639 62½	
				19,953 88½
		Balance in hands of administrator as per Schedule "A," at-ached		$212,235 61

161 STATE OF PENNSYLVANIA, *Allegheny County.* } *ss:*

Personally before me came A. M. Byers, who, being by me duly sworn, says that the above account is correct and true.

ALEX. M. BYERS.

Sworn — and subscribed this 29th day of Jan'y, 1887, *coram*—

PHILIP HOERR, *Register.*

"A."

Schedule of effects remaining in the hands of Alexander M. Byers, administrator *c. t. a.* of the estate of Mary McAuley, deceased, at the filing of his first and partial account as of date January 29, 1887, to wit:

502 shares Iron City National bank stock @ $75.00 per share, appraised value	$37,650 00
119 shares Mechanics' National bank stock @ $80.00 per share, appraised value	9,520 00
250 shares Citizens' Passenger Railway Co. stock @ $83⅓ per share, appraised value	20,833 33
250 shares Allegheny Bridge Co. stock @ $50.00 per share, appraised value	12,500 00
220 shares Pittsburgh Gas Co. stock @ $40.00 per share, appraised value	8,800 00
Mortgage on real estate	5,000 00
One promissory note	10,000 00
One oil painting, landscape	8 00
One oil painting, landscape	15 00
162 One oil painting, masquerade	10 00
" " " cattle scene	10 00
Two bronze ornaments, $15.00 each	30 00
One small mirror	50
Photographic views and portraits	1 00
Unbound books and magazines	25
Two walking-canes and one umbrella	1 00
One album, 25c.; one work box, 25c.; one duster, 5c.; two vases and card receiver, 25c.; one powder box, 10c.; one inkstand, 10c.; three match boxes, 15c.; one marble weight, 5c.	1 20
60 volumes and half-bound books	6 00
2 old trunks	1 00
Ladies' wearing apparel, consisting of clothes, bonnets, furs, shoes, and bed linen	150 00
Bed-room furniture, 2 tables, 4 chairs, 1 rocking chair, and 1 lounge	50 00
One piano-forte	75 00
One lot of tableware	50 00
One penknife, 25c.; tortoise-shell eyeglass, 25c.; 2 pocket-books and two purses, 25c.	75
One razor, 5c.; three boxes trinkets, $5.00	5 05
One set jet gold trimmings, breastpin, 2 pieces ear-rings and cross	2 00
2 breastpins, pearl and amber	10
One gold watch and two chains	20 00
One pair gold spectacles and two pair gold eyeglasses	5 00
One gold thimble	2 00
163 One linen portfolio, one deposit Iron City Bank book, one mosaic pin, broken	1 00

One pocket-book, with memorandum of bequest; one set hair jewelry	1 00
One lot of common jewelry	1 00
One plain gold ring	90
One small solitaire diamond ring	10 00
One diamond ring, garnet centre of cluster	15 00
One diamond stud	25 00
Cash	107,434 53
	$212,235 61

"B."

Expenses Incident to the Decease and Burial of Miss Mary McAuley.

Washing body of deceased and general attendance	$35 00
Flowers	18 25
Sitting in room with body of deceased	25 00
Servants	13 00
Telegrams to relatives announcing her decease	4 71
	$95 96

And now, to wit, March, 7th, 1887, the within account confirmed *nisi*.

PER CURIAM,
Per OVER, *A. J.*

March 18th, 1887.—Confirmed absolutely *sec. reg.*

PHILIP HOERR, *Clerk.*

164. STATE OF PENNSYLVANIA, *Allegheny County,* } *ss:*

I, Samuel P. Conner, register of wills and *ex officio* clerk of the orphans' court in and for said county and State, do hereby [L. S.] certify that the foregoing and annexed pages contain a true copy and correct transcript of the account in said stated case, at No. 112, March term, 1887, in the orphans' court of said county, so full and entire as the same remains of record in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court, at Pittsburgh, this fifth day of June, 1888.

SAM'L P. CONNER,
Register and ex Officio Clerk of Orphans' Court.

Filed in court Nov. 1, 1888.

H. D. GAMBLE, *Clerk.*

Supplemental Account, Exhibit No. 2, June 6, 1888.

Supplementary account of Alexander M. Byers, administrator of the estate of Mary McAuley, deceased.

Said accountant charges himself with the income derived therefrom from the date of last account on file up to June 6th, 1888, as follows:

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1887.		Income:		
Apr. 23.		Interest on G. R. Duncan mortgage	$214 00	
May 4.		Dividend on Citizens' P. R. W. Co., $4.00 a share	1,000 00	
" 11.		Dividend on Iron City Bank stock	1,004 00	
Apr. 23.		Amount of G. R. Duncan m't'ge	5,000 00	
Dec. 2.		Dividend Allegheny Bridge stock	437 50	
" "	"	Pittsburgh gas stock	330 00	
" "	"	Iron City Bank stock	1,004 00	
1888.				
Feb. 4.	"	Citizens' Pass. R'y, All'y Bridge, and P'gh gas stocks	2,080 00	
" 9.		Dividend Mechanics' Bank stock	595 00	
May 11.	"	Iron City Nat. B'k stock	1,004 00	
				$14,594 50
1887.		Expenses:		
Dec. 2.		Paid court costs and notary fees, sqearing to bill in court	5 50	
1888.				
May 23.		Paid storage on piano	21 00	
" 29.	"	G. B. Motheral fee as special examiner	125 00	
June 5.	"	Sam'l P. Conner, cl'k orphans' court, for copy administrators' %	2 50	
		Commissions on $14,594.50, collect 5 %	729 72	
				883 72
		Bal. cash, as per account filed to-day, Pittsburgh, June 6, 1888		$13,710 78

Filed in court on Nov. 1, 1888.

H. D. GAMBLE, *Clerk.*

166 *Exceptions to Account.*

In the Circuit Court for the United States for the Western District of Pennsylvania.

H. B. SHIELDS *et ux.*
vs.
ROBERT F. MCAULEY *et al.* } No. 19. May Term, 1887. In Equity.

And now, to wit, August 2nd, 1888, come Dora McAuley, J. M. Wilson, *et al.*, by their attorney, William M. Watson, and except and object to the account of Alexander M. Byers, administrator, &c., of Mary McAuley, deceased, filed in this case, and for cause present and assign the following several—

Exceptions.

1st. To the accountant's valuation of the 502 shares of stock of the Iron City National bank. This stock is worth eighty-eight dollars per share.

2nd. To the accountant's valuation placed upon the 119 shares of stock of the Mechanics' National bank. This stock is worth one hundred and one dollars per share.

3rd. To the accountant's valuation of the 250 shares of stock of the Allegheny Bridge Company. This stock is worth seventy dollars per share.

4th. To the accountant's valuation placed upon the 220 shares of stock of the Pittsburgh Gas Company. This stock is worth fifty-eight dollars per share.

5th. To the accountant's valuation of the 750 shares of stock of the Traction Railway Company. This stock is worth fifty dollars per share.

All of the above valuations refer to the time of filing
167 & 168 said account in this case.

WM. M. WATSON,
Att'y for Dora McAuley et al.

Filed before me August 2, 1888.

C. HASBROUCK, *Master.*

Filed in court Nov. 1, 1888.

H. D. GAMBLE, *Clerk.*

Exceptions to the Account.

HENRY B. SHIELDS *et al.*
vs.
ROBERT F. MCAULEY *et al.* } No. 19. May Term, 1887. In Equity.

And now, to wit, July 28th, 1888, E. P. Jones, J. M. McBurney, and D. F. Patterson appear before C. Hasbrouck, master in the above-stated case, pursuant to notice and, on behalf of the parties respectively represented by them, file the following exceptions to the supplemental account of Alex. M. Byers, administrator, to wit:

1st. They except to the commission of 5 % claimed by the accountant on so much of the income of said estate collected since the filing of his first account as was derived from the mortgage of G. R. Duncan, the accountant having already claimed a commission of
3 % on the appraised value of said estate, which included said
169 Duncan mortgage. Wherefore said accountant's claim for commission should be returned to the extent of two hundred and fifty dollars ($250).

J. M. McBURNEY.
D. F. PATTERSON.
E. P. & C. W. JONES.

Filed July 28, 1888, before—

C. HASBROUCK, *Master.*

Filed in court on Nov. 1, 1888.

H. D. GAMBLE, *Clerk.*

Assignment of J. M. Macauley to Geo. T. Jackson.

For and in consideration of one dollar to me paid, the payment whereof is hereby acknowledged, and in payment of the claims of George T. Jackson, of the city of New York, State of New York, I hereby assign, transfer, and set over unto the said George T. Jackson an interest in the estate of Mary McAuley, of Pittsburgh, Pennsylvania, deceased, equal to the sum of four thousand seven hundred and thirty seven ($4,737) dollars, with the interest thereon from May the 16th, 1884, and I order and direct the payment of that sum to be made to him, his heirs and assigns, and I hereby authorize Alexander M. Byers, Esq., the administrator of said estate, to pay the same to him or them out of the moneys due or to become due to me from said estate.

Witness my hand and seal this 29th day of April, 1886.

J. M. MACAULEY. [SEAL.]

In presence of—
CHARLES D. OLENDORF.

170 STATE OF NEW YORK, } ss:
City and County of New York, }

On this thirtieth day of April, one thousand eight hundred and eighty-six, before me personally came John M. Macauly, to me known to be the individual described in and who executed the foregoing instrument, and he acknowledged to me that he executed the same.

CHARLES D. OLENDORF,
Notary Public, N. Y. County (43).

STATE OF NEW YORK, } ss:
City and County of New York, }

I, James A. Flack, clerk of the city and county of New York and also clerk of the supreme court for the said city and county, the same being a court of record, do hereby certify that Charles D. Olendorf, whose name is subscribed to the certificate of the proof or acknowledgement of the annexed instrument and thereon written, was, at the time of taking such proof or acknowledgement, a notary public in and for the city and county of New York, dwelling in the said city, commissioned and sworn and duly authorized to take the same; and, further, that I am well acquainted with the handwriting of such notary and verily believe that the signature to the said certificate of proof or acknowledgement is genuine.

In testimony whereof I have hereunto set my hand and [L. S.] affixed the seal of the said court and county the 30th day of Apr., 1886.

JAMES A. FLACK, *Clerk.*

Filed in court Nov. 1, 1888.

H. D. GAMBLE, *Clerk.*

171 *Assignment by J. M. Macaulay to Ida Macauley et al.*

For and in consideration of one dollar to me paid, the receipt whereof is hereby acknowledged, and in payment of my indebtedness to her, I hereby assign, transfer, and set over unto Ida Macauley, of Newark, New Jersey, all the interest that remains to me in the estate of Mary McAuley, of Pittsburgh, Pennsylvania, deceased, after the payment of the claims of George T. Jackson, of New York city, and the claims of Lostitia Ida Jones, of Kingsbridge, New York, and the claims of Caroline Van Wyck, of New York city, State of New York, and I hereby order and direct that after the payment of the claims against me of the said Jackson for four thousand seven hundred and thirty-seven dollars, with the interest thereon from May 16, 1884, and of the said Jones for seven thousand five hundred dollars, and of the said Van Wyck for six thousand five hundred dollars, all the remainder of my interest in said estate be paid to the said Ida Macauley, her heirs and assigns; and I hereby authorize Alexander M. Byers, the administrator of said estate, to pay the same to her or them out of the money due or to become due to me from said estate.

Witness my hand and seal this 29th of April, 1886.

J. M. MACAULEY. [SEAL.]

Sealed and delivered in the presence of—
J. E. HOWELL.

STATE OF NEW JERSEY, *County of Essex*, } *ss:*

172 Be it remembered that on this tenth day of May, in the year of our Lord one thousand eight hundred and eighty-six, before me, a notary public for New Jersey, personally appeared John M. Macaulay, who, I am satisfied, is the person named in and who executed the within deed, and, I having first made known to him the contents thereof, he did acknowledge that he signed, sealed, and delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

J. E. HOWELL,
Notary Public, N. J.

[L. S.]

Filed in court Nov. 1, 1888.

H. D. GAMBLE, *Clerk.*

Exemplification of Record.

COMMONWEALTH OF PENNSYLVANIA, *Allegheny County*, } *sct:*

Among the records and proceedings of the court of common pleas No. two in and for the county of Allegheny and State of Pennsylvania, the following may be found as matter of file and of record at No. 165, April term, 1886, to wit:

173 *Appearance Docket Entry.*

GEORGE T. JACKSON
vs.
J. M. MACAULEY, a Resident of the State of New Jersey.

Foreign attachment in case to 1st Monday March, 1886. Aff't filed and A. M. Byers, adm'r of the estate of Mary Macauley, dec'd, summoned as garnishee. Feb. 13, 1886, *narr.* filed; executed Feb. 8, 1886, on A. M. Byers, adm'r, garnishee, and *nihil* as to def't. Jan'y 3, 1887, judgment against defendant in default *sec. reg.* for fifty-five hundred and eighty-three $\frac{8}{100}$ dollars ($5,583.08).

Judgment Docket Entry.

Defendant.	Plaintiff.	No.	Term.	Year.	Date of judg.	Amount.
J. M. Macauley, a resident of the State of New Jersey.	Geo. T. Jackson	165	April..	1886	Jan. 3, 1887	$5,583 08

GEORGE T. JACKSON
vs.
J. M. MACAULEY, a Resident of New Jersey and Not Within the County of Allegheny at the Issuing of the Writ of this Case.

In Common Pleas No. Two of Allegheny County. No. 165. April Term, 1886.

Issue foreign attachment in case assumpsit to next return day, all property and rights of def'ts in hands or control of A. M.
174 Byers, administrator of the goods, etc., of Mary Macauley, dec'd.
To proth'y.

GEO. P. GRAVER,
Att'y for Pl'ff.

Personally before me came George T. Jackson, who, being by me duly sworn, says that he is the plaintiff, and that J. M. Macauley, the defendant, is a resident and citizen of the State of New Jersey, and is now actually in said State; that said def't is justly indebted to plaintiff in the sum of four thousand seven hundred and thirty-seven dollars, with interest, from May 18th, 1884, at six per centum per annum, as the nature of a certain promissory note, of which the following is an exact copy:

$4,737.00. NEW YORK, *May 16th*, 1884.

One day after date I promise to pay to the order of George T. Jackson forty-seven hundred and thirty-seven dollars at 32 Pine street, value received.

(Signed) J. M. MACAULEY.

That the whole of said sum is long overdue and unpaid, and that by the laws of the State of New York, where said note was made and where it was to be paid, six per centum is the legal rate of interest to which pl'ff is entitled.

GEORGE T. JACKSON.

Sworn and subscribed this Jan'y 30th, 1888.
Coram—
[L. S.]

ISAAC HICKS,
Notary Public, Kings County.

Cert. filed in N. Y. Co.
Issued Feb. 6, 1886.

175 In the Court of Common Pleas No. 2, Allegheny County, No. 165, of April Term, 1886.

J. M. Macauley, a resident of New Jersey, not within the said county at the time of the issuing of the writ in this case was attached to answer George J. Jackson of a plea of trespass on the case. Whereupon the said plaintiff, by Geo. P. Graver, his attorney, complains for that whereas said J. M. Macauley, on the sixteenth day of May, in the year of our Lord one thousand eight hundred and eighty-four, at New York, to wit, in the county of New York, did make his certain promissory note in writing and deliver the same to said plaintiff and thereby promised to pay to the order of said George T. Jackson the sum of four thousand seven hundred and thirty-seven dollars ($4,737.00) in one day after the date thereof, which period has now elapsed, and the said J. M. Macauley did not pay the amount thereof, although the same was presented to him on the day when it became due, of all which the said defendant then and there had due notice; by reason whereof and by force of the statute in such case made and provided the said defendant became liable to pay to the said plaintiff the said sum of money in said note mentioned, and, being so liable, he, the said defendant, on, to wit, the 17th day of May, 1884, did assume and to the said plaintiff did promise the payment of the said sum of money in said note mentioned when he should be thereunto afterwards required; and whereas also said defendant heretofore, to wit, on the seventeenth day of May, in the year of our Lord one thousand eight hundred and eighty-four, at New York, in the county aforesaid, be-
176 came indebted to the said plaintiff in the sum of fifty thousand dollars for the price and value of goods, wares, and merchandise then and there sold and delivered by the plaintiff to the defendant at his request;

And in the sum of fifty thousand dollars for the price and value of work then and there done and materials for the same provided by the plaintiff for the defendant at his request;

And in the sum of fifty thousand dollars for money then and there lent and advanced to and paid, laid out, and expended by the plaintiff for the defendant at his request;

And in the sum of fifty thousand dollars for money found to be

due from the defendant to the plaintiff on an account then and there stated between them;

And whereas the defendant afterwards, to wit, the day and year aforesaid, in consideration of the premises, then and there promised to pay the said several sums of money respectively to the plaintiff on request; yet he disregarded his promises and has not paid any of the said moneys or any part thereof.

To the plaintiff's damage fifty thousand dollars, and therefore he brings suit.

GEO. P. GRAVER,
Attorney for Plaintiff.

Filed Feb'y 13, 1886.

177 *Amount of Claim.*

ALLEGHENY COUNTY, *ss:*

The Commonwealth of Pennsylvania to the sheriff of said county, Greeting:

We command you that you attach J. M. Macauley, a resident of the State of New Jersey, non-residents of the State of Pennsylvania, and not now within the county of Allegheny, late of your county, by all and singular his goods and chattels, lands and tenements, in whose hands or possession soever the same may be, so that he be and appear before our court of common pleas No. 2, to be holden at Pittsburgh, in and for said county, on the first Monday of March next, there to answer George T. Jackson of a plea of trespass on the case.

And you, the said sheriff, are hereby commanded to summon A. M. Byers, administrator of the goods, etc., of Mary Macauley, dec'd, and all other persons in whose hands or possession the said goods and chattels, lands and tenements, or any of them may be attached, so that they be and appear before our said court on the day and place mentioned in the above writ to answer what shall be onjected against them and abide the judgment of the said court therein; and have you then and there this writ.

Witness the Hon. Thomas Ewing, Esquire, president judge of our said court, the sixth day of Febr'y, anno Domini one thousand eight hundred and eighty-six.

JOHN BRADLEY,
Prothonotary.

178 Executed Feb'y 8, 1886, by delivering a true and attested copy of this writ to A. M. Byers, administrator, and by making known to him the contents thereof and by summoning him as garnishee; *nihil* as to def't.

So ans.—

JOS. H. GRAY, *Sheriff.*

In the Court of Common Pleas No. 2 of Allegheny County.

GEORGE T. JACKSON
vs.
J. M. MACAULEY, a Resident of New Jersey, Not Within the County of Allegheny at the Issuing of the Writ in this Case. } No. 165. April Term, 1886.

To John Bradley, Esq., proth'y:

Enter judgment against the defendant in the above case in default of an appearance and liquidate as follows:

Real debt	$4,737 00
Int. from May 17, '84	746 08
	$5,583 08

GEO. P. GRAVER,
Att'y for Pl'ff.

Filed Jan'y 3, 1887.

179 *Exemplification of Record.*

COMMONWEALTH OF PENNSYLVANIA, } *sct:*
Allegheny County,

Among the records and proceedings of the court of common pleas No. two in and for the county of Allegheny and State of Pennsylvania, the following may be found as matter of file and of record at No. 3, April term, 1887, to wit:

Appearance Docket Entry.

GEORGE T. JACKSON
vs.
A. M. BYERS, Administrator of the Estate of Mary Macauley, Dec'd, Garnishee of J. M. Macauley.

Sci. fa. surgarnishment, No. 165, April term, 1886, to 1st Monday Feb'y, 1887, and summon A. M. Byers as garnishee. Served Feb'y 4, 1887, on A. M. Byers, administrator. April 6, 1887, rule on garnishee to answer on April 27, 1887, interrogatories filed.

Præ. for Sci. Fa.

In the Court of Common Pleas No. 2 of Allegheny County.

GEORGE T. JACKSON
vs.
A. M. BYERS, Garnishee of J. M. Macauley, Resident of New Jersey, Not Within the County of Allegheny at the Issuing of the Writ in this Case. } No. 165. April Term, 1886.

To John Bradley, Esq., proth'y :

180 Issue *sci. fa.* surjudgment at 165, April T., 1886, against the defendant to show cause, if any he have, why the plaintiff should not have his execution of his judgment in said foreign attachment of the estate and effects in the hands and possession of A. M. Byers, garnishee, returnable to next return day.

GEO. P. GRAVER,
Att'y for Plff.

Filed Jan. 3, 1887.

Sci. Fa. Surgarnishment.

ALLEGHENY COUNTY, } *ss :*
The Commonwealth of Pennsylvania, }

To the sheriff of the county of Allegheny, Greeting :

[SEAL.] Whereas, by our writ, we lately commanded you that you should attach J. M. Macauley, a non-resident, &c., by all and singular his goods and chattels, rights and credits, in whose hands or possession soever the same should be found in your bailiwick, so that he should be and appear before our judges at Pittsburgh, there to be held the first Monday then next, to answer unto George T. Jackson ; upon which said writ you then returned that you had attached all the goods, chattels, and effects of the said J. M. Macauley in the hands and possession of A. M. Byers, administrator, and it was proceeded in such manner in our court that the said plaintiff ought to recover against the said J. M. Macauley the sum of fifty-five hundred and eighty-three $\frac{8}{100}$ dollars, which, to the said George T. Jackson in our same court, was adjudged
181 for his debt, &c. ;

And the said Geo. T. Jackson praying that a convenient remedy for the recovery thereof in the hands of said A. M. Byers, adm'r, &c., may be had, and we, being willing that those things which are rightly done in our said court be duly executed, do command you that by honest and lawful men of your bailiwick you make known to the said A. M. Byers, adm'r of Mary Macauley, dec'd, that he be and appear before our judges at Pittsburgh, at a court of common pleas No. 2 for the county of Allegheny, there to

be held the first Monday of February next, to show, if anything he knows or has to say, why the said Geo. T. Jackson should not have execution for the debt aforesaid of the proper goods and chattels, rights and credits, of the said J. M. Macauley in the hands of him, the said A. M. Byers, adm'r as aforesaid, and either of them being.

And have you then and there the named of those persons by whom you shall so make known to him and this writ.

Witness the Hon. Thomas Ewing, president of our said court at Pittsburgh, this 3rd day of Jan'y, in the year of our Lord one thousand eight hundred and eighty-seven.

JOHN BRADLEY,
Prothonotary.

Served Feb'y 4, 1887, by serving a true and attested copy of this writ at the residence of A. M. Byers, adm'r, with an adult member of his family.

So ans.—

JOSEPH H. GRAY, *Sh'ff.*

182 *Interrogatories and Rule on Garnishee.*

In the Court of Common Pleas of Allegheny County No. 3, of April Term, 1887.

GEORGE T. JACKSON
vs.
A. M. BYERS, Adm'r of the Estate of Mary McAuley, Dec'd, Garnishee of J. M. McAuley.

Attachment execution.

Interrogatories to the garnishee above named:

First. Do you know J. M. McAuley, of whom you are the garnishee in this attachment issued at the suit of the above-named plaintiff?

Second. Have you had any commercial or other transactions with the said J. M. McAuley? If yea, what was the state of your accounts on the fourth day of February, A. D. 1887? Annex a copy of each amount to your answer hereto.

Third. Was there or was there not a balance in your hands in favor of the said J. M. McAuley on the fourth day of February, A. D. 1887, or at any time since up to the time of your answering these interrogatories? If yea, state the *state the* amount particularly.

Fourth. Had you in your possession any goods or merchandise, money or effects, of any nature whatever belonging to the said J. M. McAuley on the fourth day of February, A. D. 1887, or at any time since? If yea, state the nature, quantity, and value of said goods and merchandise.

Fifth. Were you not, on the fourth day of February, A. D. 1887,

indebted to the said J. M. McAuley in some and in what way and in what amount? Were you since and what and when
183 and now became indebted?

GEO. P. GRAVER,
Pl'ffs Att'y.

And now, the sixth day of April, A. D. 1887, the plaintiff filed the foregoing interrogatories to the within-named garnishee, and enters a rule upon him to file his answers thereto under oath, in the prothonotary's office of said county, on or before the twenty-seventh day of April, A. D. 1887.

To the prothonotary.

GEO. P. GRAVER,
Pl'ff's Atty.

A true copy.
Attest: —— ——, *Proth'y.*

Filed April 6, 1887.

COMMONWEALTH OF PENNSYLVANIA, } *ss:*
Allegheny County, }

I, John Bradley, prothonotary of the court of common pleas, No. two in and for said county, certify that the foregoing is a full and correct copy of the whole record of the case therein stated,
[L. S.] wherein George T. Jackson, plaintiff, and J. M. MacAuley, a resident of the State of New Jersey, defendant, as the same remains of record before the said court, at No. 165, of April term, A. D. 1886.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court the 13th day of September, A. D.
184 1888.

JOHN BRADLEY,
Prothonotary.

ALLEGHENY COUNTY, *ss:*

I, Thos. Ewing, president, judge of the court of common pleas No. two in and for said county, certify that John Bradley, by whom the above attestation was made, was at the date thereof prothonotary of said court, duly qualified, and the said attestation is in due form of law and made by the proper officer.

Witness my hand and seal the 13th day of September, A. D. 1888.

THOS. EWING. [SEAL.]

ALLEGHENY COUNTY, *ss:*

I, John Bradley, prothonotary of the court of common pleas No. two for said county, certify that Hon. Thos. Ewing, Esq., by whom
[L. S.] the above certificate was given and whose name is thereby subscribed in his own proper handwriting, was at the date thereof president judge of the said court, duly commissioned and sworn and acting.

In witness whereof I have hereunto set my hand and affixed the seal of said court the 13th day of September, 1888.

JOHN BRADLEY,
Prothonotary.

Filed in court Nov. 1, 1888.

H. D. GAMBLE, *Clerk.*

185 *Acceptance of Notice by Attorneys Before Master.*

In the Circuit Court of the United States for the Western District of Pennsylvania.

HENRY B. SHIELDS *et al.*
vs.
ROBERT F. MCAULEY *et al.* } No. 19. May Term, 1887. In Equity.

May 29, 1888. C. Hasbrouck, appointed master.

The undersigned, appointed master in the above case, will attend to the duties of said appointment, at his office, No. 409 Grant street, in the city of Pittsburgh, on Wednesday, the 13th day of June, 1888, at 3 o'clock p. m., when and where all parties interested will please attend.

C. HASBROUCK, *Master.*

May 31, 1888.

We accept service of the above notice for the parties represented by us respectively on the record.

KNOX & REED.
E. P. & C. W. JONES.
D. F. PATTERSON.
D. T. WATSON.
W. M. WATSON.
WM. L. CHALFANT,
Att'y for Ebenezer McBurney.
THOS. PATTERSON,
Att'y for Home for Friendless.
LYON & SHOEMAKER, *Att'ys.*
H. & G. C. BURGWIN,
Att'ys for Home for Aged Protestant Women.

186 *Appearance of S. Schoyer, Jr.*

In the Circuit Court of the United States for the Western District of Pennsylvania.

SHIELDS
vs.
MCAULEY. } No. 19. May Term, 1887.

To the clerk of U. S. C. C.:

Please enter my appearance with W. M. Watson and Lyon &

Shoemaker for the defendants in the above case for whom they appear.

S. SCHOYER, JR.

Filed Nov. 27, 1888.

H. D. GAMBLE, *Clerk.*

Exceptions to Master's Report.

In the Circuit Court of the United States for the Western District of Pennsylvania.

HENRY B. SHIELDS *et al.* *vs.* ROBERT F. MCAULEY *et al.* } No. 19. May Term, 1887. In Equity.

And now, to wit, November 30, 1888, comes Melissa M. Shields, by her solicitors, Knox & Reed, and files the following exceptions to the master's report in this case:

First. The master erred in his finding and opinion that the
187 first cousins of Mary McAuley, deceased, were entitled to share in the distribution of personal estate to the exclusion of second cousins.

Second. The master erred in awarding the entire balance for distribution to the first cousins to the exclusion of the second cousins of Mary McAuley, deceased.

Third. The master should have found as a fact who were the second cousins of Mary McAuley, deceased, and should have awarded to them a proportionate share of said estate.

Fourth. The master should have awarded to Melissa M. Shields, a second cousin of Mary McAuley, deceased, a share of said estate.

KNOX & REED,
Solicitors for Melissa M. Shields.

Filed Nov. 30, 1888.

H. D. GAMBLE, *Clerk.*

Exceptions to Master's Report.

United States Circuit Court for the West. District of Pa.

HENRY B. SHIELDS *et ux.* *vs.* ROBERT F. MCAULEY *et al.* } No. 19. May Term, 1887.

And now, to wit, November 30th, 1888, came Dora McAuley and the other defendants for whom we appear in this case, by their attorneys, Wm. M. Watson and S. Schoyer, Jr., and to the master's report filed in the above-entitled case on the first day of No-
188 vember, 1888, present and offer the following objections and—

Exceptions.

First. The master erred in finding and deciding that the thirteen first cousins of Mary McAuley, deceased, named in said report are entitled to share equally in the distribution of said decedent's estate to the exclusion of second cousins of decedent and in awarding to said thirteen first cousins the entire balance of the personal estate of decedent.

Second. The master erred in not finding and deciding that the second cousins of said decedent are entitled to share in the distribution of decedent's estate by representation of their parents, the deceased first cousins, of said Mary McAuley, deceased.

Third. The master erred in deciding that second cousins have no interest whatever in this estate of Mary McAuley.

Fourth. The master erred in deciding that the second cousins of said Mary McAuley, deceased, should not have joined either as plaintiffs or defendants in this proceeding.

Fifth. The master erred in not finding as matter of fact who are the second cousins of decedent.

S. SCHOYER, JR.,
WM. M. WATSON,
Att'ys for Dora McAuley and All Other Parties for Whom We Appear.

Filed Nov. 30, 1888.

H. D. GAMBLE, *Clerk.*

189 *Opinion of Court.*

HENRY B. SHIELDS *et al.* *vs.* ROBERT F. MCAULEY *et al.* } No. 19. May Term, 1887. In Equity.

Coram McKennan, Cir. J., and Acheson, J.

Per Curiam:

1. James McAuley, who died on the 9th day of January, 1871, by his will dated and executed Nov. 26th, 1870, made large bequests to his sisters Margaret and Mary, and also devised to them a house and lot on Duquesne way, in the city of Pittsburgh. Margaret died in 1871, a few months after her brother, and thereupon her interest in said property passed to her sister Mary, who died January 6th, 1886, seized of said real estate and leaving also a large personal estate. As respects the latter she died intestate, but she left an instrument of writing signed by her (the body thereof being also in her handwriting), of which the following is a copy:

"By request of my dear brother my house on Duquesne way is to be sold at my death and the proceeds to be divided between the 'Home of the Friendless' and the 'Home for Protestant Destitute Women.'

"MARY McAULEY."

On January 12th, 1886, this instrument was admitted to probate as the will of Mary McAuley.

The two named beneficiaries are corporations of the State of Pennsylvania and charitable institutions within the meaning of the
190 act of assembly of April 26th, 1885, which avoids bequests, devises, or conveyances to any body politic or to any person in trust for religious or charitable uses, unless made by deed or will attested by two credible and at the same time disinterested witnesses at least one calendar month before the decease of the testator or alienor. Hence the next of kin of Miss Mary McAuley contest the validity of the disposition of the proceeds of said real estate made by said instrument.

While there is no direct testimony to fix the precise date when said instrument was executed, there is circumstantial evidence quite sufficient to warrant a finding that it was much more than one calendar month before Miss McAuley's decease; but then the want of attestation by two witnesses remains as an objection against giving full effect to the paper if it is to be treated simply as the will of Miss McAuley. Must it be so regarded or (as maintained by the learned counsel for the beneficiaries) may it be accepted as a valid declaration on the part of Mary McAuley of the terms of a trust upon which she held the property?

It is a settled principle that if a testator make a devise in terms absolute, but upon a private understanding had with his devisee, whether by the latter's express promise or his assent implied from silence, that he will apply the devised estate to some purpose designated by the testator, a trust arises which a court of equity will enforce unless unlawful in itself. Lewin on Trusts, 70; Wallgrave *v.* Tebbs, 2 K. & J., 313, 321; Tee *v.* Ferris, *ibid.*, 357; Springett *v.* Jennings, Law Rep., 10 Eq., 483; 3 Redfield on Wills, 485; Story's Eq. Jur., 9th, 250; Hoge *v.* Hoge, 1 Watts, 163; Church *v.* Ruland, 64 Pa. St., 432, 442.

191 In our judgment such a trust is shown here. The instrument in question manifestly was designed to carry out the purpose of James McAuley, the execution of which he had confided to his devisee. The paper both in its scope and aim is unlike an ordinary will. It deals with nothing but the Duquesne-way house. As to everything else Miss McAuley was content to die intestate; but that particular property had been devoted by her brother to charitable purposes, to take effect at her death. Evidently he had communicated his intention to her and she had accepted the trust. All this, we think, is plain upon the face of the paper.

"By the request of my dear brother my house on Duquesne way is to be sold at my death and the proceeds to be divided," etc. It was, then, his intention Miss McAuley sought to effectuate. Clearly she was acting in fulfillment of a sacred confidence. True, she herself uses the word "request," but undoubtedly her understanding was that an obligation had been imposed on her. In Colton *v.* Colton, 122 N. S., 319, the court says: "It is an error to suppose that the word "request" necessarily imports an option to refuse and excludes the idea of obedience as corresponding duty. * * * Accord-

ing to its context and manifest use an expression of desire or wish will often be equivalent to a positive direction where that is the evident meaning and purpose of the testator." Miss Mary McAuley, who had perfect knowledge of her brother's intention and fully understood her own duty, having undertaken to carry out his purpose by this instrument of writing, it is not for her next of kin to question the existence of a trust thus recognized by her or to gainsay her deliberate act.

192 James McAuley's will was executed more than one calendar month before he died. Whether the understanding with his devisee was entered into contemporaneously with the signing of his will or before or after is not known. There is, however, nothing to indicate that the arrangement was made within one month before his death, nor is this alleged in the bill. In Manners *v.* Library Co., 93 P. St., 176, it is said that the act of April 26, 1855, being in derogation of the common-law right of conveyance, the averments of a bill must be so distinct and clear as to bring the case within the terms of the law. Certainly a court of equity will not assume illegality in this trust, but, in furtherance of the beneficent intention of the donor, will rather make every reasonable presumption favorable to its validity.

In respect to the second-named charity, "the Home for Protestant Destitute Women," there is a misnomer, the true title being "the Home for Aged Protestant Women," but this is not material, as it clearly appears that this is the institution intended. Domestic & F. M. Society's appeal, 30 Pa. St., 425.

2. In awarding the personal estate of the decedent (Mary McAuley) to the first cousins, to the exclusion of the second cousins, the master followed the decision of the supreme court of Pennsylvania in Breneman's appeal, 40 Pa. St., 115. The precise question was involved and directly ruled in that case, and it is conceded that if we follow that ruling the master's distribution must be confirmed. That decision has never been qualified or questioned by the supreme court.

193 As it gives a construction to the Pennsylvania statutes of distribution in cases of intestacy, it is binding upon this court here, even were our own judgment different. Leffingwell *v.* Warren, 2 Black, 599. But in truth we entertain no doubt whatever as to the correctness of the decision. In our opinion it is clearly in accordance with the terms and intent of the statutes.

Filed Dec. 24, 1888.

H. D. GAMBLE, *Clerk.*

Petition of Alexander M. Myers, Administrator, &c., for Order to Sell Real Estate.

To the honorable the judges of the circuit court of the United States for the western district of Penna:

The petition of Alex. M. Byers respectfully represents—

That he is administrator with the will annexed of Mary McAuley, deceased, which said will is duly probated and registered in the reg-

ister's office in and for the county of Allegheny, in Will Book, vol. 29, page 482. A copy of the said will is as follows:

"By the request of my dear brother my house on Duquesne way is to be sold at my death and the proceeds to be divided between the Home of the Friendless and the Home for Protestant Women.

MARY McAULEY.

That the said will having directed a sale of said real estate without naming any person to execute said power and direction, it became and was the duty of your petitioner, as administrator
194 *c. t. a.* as aforesaid, under the act of assembly of Pennsylvania in such case made and provided, to execute the same under the direction of the orphans' court of the said county of Allegheny.

Your petitioner has accordingly made application to said court at No. 342, September term, 1888, for an order or direction to sell said property, and the said petition, with the *the* various proceedings thereon and the order thereupon made, is hereto attached in an exemplification of the record of said orphans' court in said action.

That by bill in equity filed in this court at No. 19, November term, 1887, certain of the heirs *abd* distributees of said Mary McAuley, dec'd, have prayed *inter alia* that the said will of Mary McAuley and the probate thereof may be cancelled and declared void and of no effect; that said matter has not been finally disposed of, but same is still open and pending in this court.

Wherefore your petitioner prays that the said order of sale of the orphans' court of Allegheny county so as hereto attached may be approved and confirmed by your honorable court, and that your petitioner may be ordered and directed to make sale of the said described real estate of Mary McAuley upon the terms and in the manner in said mentioned order prescribed.

And your petitioner will ever pray, &c.

ALEX. M. BYERS.

ALLEGHENY COUNTY, *ss:*

Before me personally appears Alex. M. Byers, who, being duly sworn according to law, says that the statements made in the foregoing petition are true and correct, to the best of his knowledge and belief.

ALEX. M. BYERS.

Sworn and subscribed this 7th day of Dec., 1888.

L. H. MATHEWS,

[L. S.] *Notary Public.*

195 The undersigned, representing the respective parties in interest in the estate of Mary McAuley, dec'd, do hereby

waive the issuing of any rule to show cause in above matter, and agree that the order prayed for be made without further notice.

H. & G. C. BURGWIN,
Att'ys for the Home for Aged Protestant Women.
E. P. & C. W. JONES,
Att'ys for R. F. McAuley, Mrs. Blakeley, and Mrs. Shearer.
KNOX & REED, *Att'ys for H. B. Shields et al.*
LYON & SHOEMAKER,
Att'ys for Jane Stewart et al.
WM. L. CHALFANT,
Att'y for Ebenezer McBurney.
D. F. PATTERSON, JOHN W. DONNAN, AND JAMES M. McBURNEY,
Att'ys for Ebenezer McAuley, Eliza Monzingo, Sarah Thompson, Catharine Gault, and Martha Crawford.
WM. M. WATSON, *Att'y for Dora McAuley et al.*
THOS. PATTERSON,
Att'y for Home for the Friendless.

Pittsburgh, Pa., Dec. 7th, 1888.

In the Matter of the Estate of MARY MCAULEY, Deceased.

To the honorable the judges of the orphans' court of *of* Allegheny county:

196 The petition of Alex. M. Byers, administrator *c. t. a.* of Mary McAuley, deceased, respectfully represents—

That said Mary McAuley died on the — day of Jan'y, 1886, seized in fee of a certain house and lot on Duquesne way, in the city of Pittsburgh, bounded and described as follows, viz: Beginning on Duquesne way at the distance of fifty (50) feet west from Fifth St. (formerly Pitt St.) in said city, thence along Duquesne way down the Allegheny river thirty-five (35) feet, thence at right angles to Duquesne way and parallel with Fifth St. one hundred and sixty-four (164) feet to a twelve-foot alley, thence by said alley eastwardly and parallel with Duquesne way thirty-five (35) feet, thence northwardly and parallel with Fifth street one hundred and sixty-four (164) feet to Duquesne way, the place of beginning.

That by her last will and testament, duly probated and registered in Will Book, vol. 29, page 482, the said Mary McAuley ordered and directed her said property on Duquesne way to be sold, as by reference to said will, a true copy whereof is hereto attached and made part hereof, may more fully appear.

That letters of administration *cum testamento annexo* upon said will were heretofore, on the 12th day of January, A. D. 1886, duly granted to your petitioner.

Wherefore your petitioner prays your honorable court to order and direct him to expose said described real estate at public sale and to make sale thereof in accordance with the terms of the act of assembly in such case made and provided.

A. M. BYERS,
Administrator.

197 ALLEGHENY COUNTY, *ss*.

Before me personally appeared A. M. Byers, who, being duly sworn, says that the statements made in the foregoing petition are true and correct to the best of his knowledge and belief.

A. M. BYERS.

Sworn and subscribed this 6th day of November, A. D. 1888.
Coram—

L. H. MATHEWS,
Notary Public.

Copy of the Will of Mary McAuley.

By the request of my dear brother my house on Duquesne way is to be sold at my death and the proceeds to be divided between the Home of the Friendless and the Home for Protestant Destitute Women.

(Signed) MARY McAULEY.

And now, viz., Nov. 16th, 1888, the within petition presented in open court and thereupon, upon consideration thereof, a citation is directed issue to the parties interested in said within-described real estate to show cause why the order of sale prayed for should not be granted, returnable Nov. 28th, 1888, at 10 a. m.

PER CURIAM.

Filed Nov. 16th, 1888.

STATE OF PENNSYLVANIA, } *sct:*
Allegheny County, }

In the Orphans' Court in and for said County.

198 In the Matter of the Estate of MARY McAULEY, Deceased.

No. —. Sept. T., 1888.

In re petition of Alex. M. Byers, adm'r of said estate, presented, praying—

The court for an order directing him to make public sale of the real estate decendent described in petition filed:

Our said court granted a citation returnable Wednesday, the 28th day of Nov., A. D. 1888, at 10 o'clock a. m.

Now, therefore, we command you, the parties in interest, that you be and appear before the judges of our said court on or before Wednesday, the 28th day of November, A. D. 1888, at 10 o'clock a. m., then and there to show cause, if any you have, why the prayer of petitioner should not be granted.

Herein fail not.

Witness Hon. Wm. G. Hawkins, Jr., judge of our said orphans' court, at Pittsburgh, this 16 day of November, A. D. 1888.

SAM'L P. CONNER,
Clerk of Orphans' Court.

Nov. 16, 1888, service of within accepted.
LYON & SHOEMAKER,
Att'ys for Jane Stewart, Mary Parker, Eliza Paul, Wm. M. Parker, Mary M. Montgomery, Margaret Ann Payne, Sarah M. Hill, and Robert F. M. Campbell.
E. P. & C. W. JONES, *Att'ys for Mrs. Blakeley et al.*
WM. L. CHALFANT, *Att'y for Ebenezer McBurney.*
H. & G. C. BURGWIN,
199 *Att'ys for Home for Aged Protestant Women.*
WM. M. WATSON, *Att'y for Dora McAuley et al.*
D. F. PATTERSON, JNO. W. DONNAN, AND J. M. McBURNEY,
For Ebenezer McBurney, Eliza Monzingo, Sarah Thompson, Catharine Gault, and Martha Crawford.
D. F. PATTERSON, *Att'y for Home for the Friendless.*

In Re Estate of MARY MCAULEY, Deceased. } No. 342. Sept. Term, 1888. *In Re* Petition for Sale.

Decree for Sale.

And now, viz., December 1st, 1888, the above matter came on for hearing upon the petition of Alex. M. Byers, administrator of Mary McAuley, dec'd, the citation in said matter having been duly served and no answer having been filed; and thereupon, upon consideration thereof, the prayer of said petition is granted and the said administrator is ordered and directed to expose said real estate in said petition described at public sale upon due advertisement and notice, as required by the act of assembly in such case made and provided. Terms of sale to be one-third of purchase-money in cash on delivery of the deed, balance in two equal annual payments *second* by bond and mortgage with thirty (30) day *sci. fa.* clause, bearing interest at the rate of six per cent. (6%) per annum, returnable the 19th day of Jan., 1889.

PER CURIAM,
PER OVER, A. *J.*,
Specially Presiding.

Filed Dec. 1st, 1888.

200 STATE OF PENNSYLVANIA, } *ss:*
Allegheny County, }

I, Samuel P. Conner, register of wills and *ex officio* clerk of the orphans' court in and for said county and State, do hereby [L. S.] certify that the foregoing and annexed pages contain a true copy and correct transcript of the record and proceedings in said stated case, at No. 342, Sept. term, 1888, in the orphans' court of said county, so full and entire as the same remains of record in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court at Pittsburgh this 7th day of Dec., 1888.

SAM'L P. CONNER,
Register and ex Officio Clerk of Orphans' Court.

STATE OF PENNSYLVANIA, *Allegheny County,* } *ss:*

I, Wm. G. Hawkins, Jr., president judge of the orphans' court in and for the county and State aforesaid, do hereby certify that the above-named Samuel P. Conner, by whom the foregoing attestation was made, was at the time of making the same and is now *ex officio* the clerk of said court, duly commissioned and qualified, to all whose acts as such full faith and credit are and ought to be given; that the seal thereto annexed is the seal of the said court, and that the said attestation so made by him is in due form of law.

In testimony whereof I have hereunto set my hand and
201 seal at Pittsburgh this 7th day of Dec., 1888.

[SEAL.] W. C. HAWKINS,
President Judge.

ALLEGHENY COUNTY, *ss:*

I, Samuel P. Conner, register of wills and *ex officio* clerk of the orphans' court in and for said county, do certify that Hon. W. G. Hawkins, Jr., by whom the foregoing certificate was given and whose name is thereto subscribed in his own proper handwriting, was at the date thereof president judge of the said court, duly commissioned, sworn, and acting.

In witness whereof I have hereunto set my hand and affixed the seal of the said court, at Pittsburgh, this 7th day of Dec., 1888.

[L. S.] SAM'L P. CONNER,
Register and ex Officio Clerk of Orphans' Court.

Filed Dec. 24, 1888.

H. D. GAMBLE, *Clerk.*

Decree for Sale of Real Estate.

SHIELDS *et al.*
vs.
MCAULEY *et al.* } No. 19. May Term, 1887.

Surpetition per order to sell real estate.

And now, December 24th, 1888, this matter came on to be
202 heard upon the petition of Alexander M. Byers, administrator *c. t. a.* of Mary McAuley, deceased, for an order to sell the house and lot of ground situate on Duquesne way, in the city of Pittsburgh, and written consent to such an order by the counsel representing the respective parties in interest, and thereupon, on consideration, it is ordered, adjudged, and decreed that the said Alexander M. Byers, administrator *c. t. a.*, sell the said real estate upon

the terms and in the manner prayed; report of such sale to be made to this court for confirmation and the proceeds to be held subject to the decree of this court.

BY THE COURT.

Filed Dec. 24, 1888.

H. D. GAMBLE, *Clerk.*

Final Decree.

In the Circuit Court of the United States for the Western District of Pennsylvania.

HENRY B. SHIELDS *et al.*
vs.
ROBERT MCAULEY *et al.* } No. 19. May Term, 1887. In Equity.

And now, to wit, January 5th, 1889, this cause came on to be heard on bill, answers, replication, testimony, and the report of the master with exceptions thereto, and was argued by counsel; whereupon, upon consideration thereof by the court, it is ordered, ad-
203 judged, and decreed that the proceeds of the sale of the real estate that was of Mary McAuley, deceased, situate on Duquesne way, in the city of Pittsburgh, after deducting expenses attending the same, shall be distributed equally between the "Home for the Friendless" and the "Home for Aged Protestant Women."

And it is further ordered, adjudged, and decreed that the exceptions to the master's report be overruled and the said report confirmed, and that the personal estate of said decedent be distributed among the thirteen first cousins of said decedent to the exclusion of her second cousins in conformity with said master's report, and that unless an appeal be duly entered from this decree within sixty days from this date the administrator is ordered to transfer the stocks and pay out the cash of said decedent's personal estate in accordance with the schedule of distribution reported by the said master, adding the sum of nine dollars and sixty-one cents ($9.61) to the cash share of each of said thirteen distributees to cover the duplicate credit of one hundred and twenty-five dollars ($125) for examiner's fees inadvertently allowed in said master's report.

BY THE COURT.

Filed Jan'y 5, 1889.

H. D. GAMBLE, *Clerk.*

204 *Notice of Application to Fix Amount of Bond for Appeal.*

In the Circuit Court of the United States for the Western District of Pennsylvania.

HENRY B. SHIELDS
vs.
ROBERT F. MCAULEY *et al.* } No. 19. May Term, 1887.

To D. T. Watson, Esq., attorney for A. M. Byers, administrator; Thos. Patterson, Esq., D. F. Patterson, Esq., E. P. Jones, Esq., W. L. Chalfant, Esq., Lyon & Shoemaker, Esqs., and G. C. Burgwin, Esq.

Take notice that an application will be made on Thursday, January 17th, 1889, at 10 o'clock a. m., to the circuit court to fix the amount of the bond in the above case for appeals to the Supreme Court of the United States.

KNOX & REED,
Attorneys for Plaintiff.
W. M. WATSON,
Attorney for J. M. Wilson et al.

Service accepted this 15th day of January, A. D. 1889.

Service accepted this 15th Jan., A. D. 1889.

THOS. PATTERSON,
Att'y for Home for the Friendless.
D. F. PATTERSON,
For Ebenezer McBurney et al.
H. & G. C. BURGWIN,
Attorneys for Home for Aged Protestant Women.

205 Service accepted this 15th day of January, 1889.

D. T. WATSON,
For A. M. BYERS, *Adm'r.*
E. P. & C. W. JONES,
Att'ys for Mrs. Blakeley, Mrs. Shearer, and Robert McAuley.

The amount of bond fixed for $25,000.00 for the entire appeal to be apportioned as appellants desire.
Filed Jan'y 17, 1889.

H. D. GAMBLE, *Clerk.*

Bond for Appeal.

In the Circuit Court of the United States for the Western District of Pennsylvania.

HENRY B. SHIELDS, a Resident Citizen of Ohio,
vs.
ROBERT MCAULEY, a Resident Citizen of the State of Pennsylvania.

Know all men by these presents that we, Henry B. Shields, of Girard, Ohio; E. M. Byers and Thomas T. Stevenson, of Allegheny county, Pennsylvania, are held and bound unto Robert McAuley, Mary Douglass, Susan Blakeley, Sarah M. Hill, George T.
206 Jackson, Lostitia Ida Jones, Caroline Van Wyck, Ida Macauley, Margaret Shear, Ebenezer McBurney, Julia Ash, Sarah Thompson, Catharine Gault, Eliza Monzingo, Martha Crawford, A. M. Byers, administrator; the Home of the Friendless, the Home for Aged Protestant Women, their executors, administrators, successors, or assigns, in the sum of twenty-five thousand dollars, lawful money of the United States of America; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this — day of January, A. D. 1889.

Whereas the above-named Henry B. Shields is about to appeal to the Supreme Court of the United States from the final decree of the circuit court of the United States in the above-entitled action:

Now, therefore, the condition of this obligation is such that if such appeal is taken and the said Henry B. Shields shall prosecute his appeal to effect, and if he shall fail to make his plea good shall answer all damages and costs, with just damages for delay and costs and interest on the appeal, then this obligation shall be void; otherwise to be and to remain in full force and virtue.

HENRY B. SHIELDS. [SEAL.]
E. M. BYERS. [SEAL.]
T. I. STEVENSON. [SEAL.]

Signed and sealed in presence of—

H. D. GAMBLE.

Jan'y 21, 1887.

UNITED STATES OF AMERICA,
Western District of Pennsylvania.

Henry B. Shields, E. M. Byers, Thomas J. Stevenson, being
207 duly sworn, say that the sureties on the said bond are each worth the amount thereof over and above their just debts and lia-

bilities and the property exempt by law from levy and sale on execution.

HENRY B. SHIELDS.
E. M. BYERS.
T. I. STEVENSON.

Sworn and subscribed this 21st day of January, A. D. 1889, *coram*—
H. D. GAMBLE,
Clerk U. S. Cir. Court.

And now, to wit, Jan. 21, 1889, within bond approved.
M. W. ACHESON, *U. S. Judge.*

Filed January 21, 1889.
H. D. GAMBLE, *Clerk.*

Petition for Appeal.

In the Circuit Court of the United States for the Western District of Pennsylvania, Sitting in Equity. No. —. May Term, 1887.

To the honorable the judges of the said court:

HENRY B. SHIELDS, resident and citizen of the State of Ohio, assignee of James McAuley, a resident and citizen of the State of Kansas, and Henry B. Shields, in right of his wife, Melissa M. Shields, also a resident and citizen of the State of Ohio, brings this *their* bill

208 *against*

ROBERT F. MCAULEY, MARY DOUGLASS, SUSAN BLAKELY, Sarah M. Hill, Robert F. M. Campbell, Mary Parker, Jane Stewart, all citizens of the State of New York; Rev. John McAuley, a citizen of the State of New Jersey and resident therein; Martha Jane McGogney and William B. McGogney, her husband; Margaret P. Hugus and N. H. Hugus, her husband; Catherine Watson, Dr. William Watson, Wilson Stewart Watson, James M. Watson, Julia Ash, Ebenezer McBurney, Kate Gault, Sarah Thompson, Martha Crawford, Ebenezer McBurney, all citizens and residents of the State of Pennsylvania; William Parker, a resident and citizen of the State of Iowa; Eliza Paul, Rilla Wilson, and Dr. J. M. Wilson, her husband; Mary Montgomery and Dora McAuley, all residents and citizens of the State of Illinois; Eliza A. Egbert and Thomas McAuley, residents and citizens of the State of California; James Campbell, a resident and citizen of the State of Nebraska, and others.

To the honorable the Supreme Court of the United States:

The appeal of Henry B. Shields, the above-named plaintiff, respectfully showeth—

That on the 28th day of March, 1887, your petitioner, in his own right and in right of his wife, did file his bill of complaint in the circuit — of the United States for the western district of Pennsyl-

vania at the above number and term, setting forth that Mary McAuley, late of the county of Allegheny, died on the 6th day of January, A. D. 1886, and at the time of her death was a citizen of the State of Pennsylvania.

That said Mary McAuley left no relative but first and second cousins; that on the 12th day of January, 1886, a
209 writing purporting to be the last will and testament of the said Mary McAuley, deceased, was offered for probate in said county of Allegheny by A. M. Byers, one of the defendants in said bill, and was admitted by the register of wills of said county to probate; that letters of administration *cum testamento annexo* upon the estate of said decedent were issued to the said A. M. Byers; that the paper purporting to be the last will and testament of Mary McAuley, deceased, a copy of which was attached to said bill, was not executed within the time required by the act of the General Assembly of the State of Pennsylvania approved the 26th day of April, 1855; that the bequests of the Home for Friendless and Home for Aged Protestant Women had lapsed and become void; that the said Mary McAuley died seized of a large estate, partly realty and partly personalty; that the said A. M. Byers had not proceeded in accordance with the laws of the State of Pennsylvania in filing a true account; that there were two classes of claimants of the estate of Mary McAuley, deceased, to wit, first and second cousins; that Henry B. Shields was an assignee of James McAuley, a first cousin; that great and difficult questions have arisen in the distribution of the said estate among said claimants; that said bill prayed that the probate of said alleged will be declared void and of no effect; that bequests in said will be declared lapsed; that the said A. M. Byers be enjoined and restrained from selling or disposing of real estate, etc., and that the court direct a decree and partition of such real estate, and that the said A. M. Byers be ordered and directed to make a full and true account of the assets of said estate.

210 That answers were filed by certain of the defendants respectively, and the matter was so proceeded with that a master was appointed, who filed his report November 1st, 1888; that exceptions thereto ware filed, and upon the 5th day of January, 1889, the circuit court did upon bill, answers, replications, testimony, and the report of master and exceptions thereto hear the said case and dismissed the said exceptions and confirmed the master's report, and did make the final decree that the real estate that was of Mary McAuley, deceased, situate on Duquesne way, in the city of Pittsburgh, be distributed equally between the Home for the Friendless and the Home for the Aged Protestant Women; that the personal estate of said decedent be distributed among the 13 first cousins of said decedent to the exclusion of the second cousins; that the administrator is ordered to transfer the stocks and pay out the cash aforesaid of said decedent's personal estate in accordance with the schedule of distribution reported by the said master.

Wherefore this appellant appeals from the whole of said decree of the said circuit court of the United States and herein prays that the decree of the circuit court and the pleadings, depositions, evidence,

and proceedings in the said case may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear said case anew, and that such decree of the said circuit court and every part thereof may be reversed and a decree made as to the said Supreme Court of the United States may seem just.

HENRY B. SHIELDS.

211 It is understood that this appellant does not appeal from the order of the circuit court directing the sale of the real estate on Duquesne way, Pittsburgh, Pa., and hereby consents to said sale.

HENRY B. SHIELDS.

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

Before me, the subscriber, personally came Henry B. Shields, who, being duly sworn according to law, deposes and says that this appeal is not taken for the purpose of delay, but because injustice has been done him by the decree of said circuit court.

HENRY B. SHIELDS.

Sworn and subscribed to before me this 21st day of January, A. D. 1889.

H. D. GAMBLE, *Clerk.*

Order of Court.

And now, to wit, January 21st, 1889, the within petition of Henry B. Shields asking for an allowance of an appeal to the Supreme Court of the United States being presented, said appeal is allowed and the bond of said appellant with E. M. Byers and Thomas J. Stevenson as sureties in the sum of $25,000.00 is hereby approved.

By the court:

M. W. ACHESON, *U. S. Judge.*

Filed January 21, 1889.

H. D. GAMBLE, *Clerk.*

212 In the Circuit Court of the United States for the Western District of Pennsylvania, Sitting in Equity. No. 19. May Term, 1887.

HENRY B. SHIELDS *et al.*

vs.

ROBERT F. MCAULEY, MARY DOUGLASS, SUSAN BLAKELEY, SARAH M. HILL, Robert F. M. Campbell, Mary Parker, Jane Stewart, all citizens of the State of New York; Rev. John McAuley, a citizen of the State of New Jersey and resident therein; Martha Jane McGogney and William F. McGogney, her husband; Margaret P. Hugus and N. H. Hugus, her husband; Catherine Watson, Dr. William Watson, William Stewart Watson, James M. Watson, Julia Ash, Ebenezer McBurney, Kate Gault, Sarah Thompson, Martha Crawford, Ebenezer McBurney, all citizens and residents of the State of Pennsylvania; William Parker, a resident and citizen of the State of Iowa; Eliza Paul, Rilla Wilson and Dr. J. M. Wilson, her husband; Mary Montgomery and Dora McAuley, all residents and citizens of the State of Illinois; Eliza A. Egbert and Thomas McAuley, residents and citizens of the State of Nebraska, and others.

To the honorable the judges of the said court:

The petition of Alexander M. Byers, administrator *cum testamento annexo* of Mary McAuley, late of the county of Allegheny, in the State of Pennsylvania, deceased, respectfully shows—

213 That he — one of the defendants to the bill in equity filed by Henry B. Shields and others in this honorable court on the 28th day of March, 1887.

That this defendant then was and for some time theretofore had been and still is administrator *cum testamento annexo* of the said Mary McAuley, deceased, and as such then had and theretofore had and still has in his possession and control as such administrator a large amount of cash and stocks belonging to said estate.

That upon the filing of the said bill in this honorable court your petitioner filed a plea setting up, in substance, that the orphans' court of the county of Allegheny, in the State of Pennsylvania, had already acquired jurisdiction of the said administrator and of the personal property within his possession and control as administrator, and that therefore the circuit court of the United States had not jurisdiction of the controversy raised in said bill. This plea was overruled, and this petitioner subsequently answered and again set up the want of jurisdiction of this court over this petitioner as administrator, so far as at least the personal property within his possession and control as administrator was concerned.

That subsequently such proceedings were had in the said cause that this court did heretofore, to wit, and on the — day of —— decree an accounting by your petitioner as administrator as aforesaid and referred the matter to a master, and subsequently and on the 5th day of January, 1889, this court did make a final decree ordering and directing your petitioner to pay out and divide all the

personal property in his possession and control as adminis-
214 trator to and among certain persons designated in said decree.

That your petitioner is aggrieved by the said decree, and doth appeal therefrom to the Supreme Court of the United States, and prays that this appeal may be allowed and that a transcript of the record, proceedings, and evidence in the cause, duly authenticated, may be sent to the Supreme Court of the United States, and that the amount of the bond such as may operate as a supersedeas as provided by law may be fixed.

ALEX. M. BYERS,
Administrator of Estate Mary McAuley, Dec'd.

STATE OF PENNSYLVANIA, } ss:
County of Allegheny, }

Personally before me came Alexander M. Byers, the above-named petitioner, who, being by me duly sworn, says that this appeal is not taken for the purpose of delay, but because injustice has been done by said decree.

ALEXANDER M. BYERS.

Sworn and subscribed before me this 19th day of Feb'y, 1889.

L. H. MATHEWS,
[L. S.] *Notary Public.*

And now, Feb. 19th, 1889, the within petition presented in open court, the prayer thereof is granted, and the appeal allowed, and the appellant's bond is fixed at $25,000.00.

BY THE COURT.

Filed Feb. 19, 1889.

H. D. GAMBLE, *Clerk.*

215 In the Circuit Court of the United States for the Western District of Pennsylvania.

HENRY B. SHIELDS, a Resident and Citizen of Ohio,
vs.
ROBERT MCAULEY, a Resident and Citizen of the State of Pennsylvania. } No. 19. May Term, 1887.

Know all men by these presents that we, Alexander M. Byers, a citizen of Pittsburgh, Pennsylvania; J. Kidd Fleming, of Sewickley, in said county and State, and E. M. Butz, of Allegheny City, in the county and State *of* aforesaid, are held and firmly bound unto Robert McAuley, Mary Douglass, Susan Blakely, Sarah M. Hill, George T. Jackson, Lostitia Ida Jones, Caroline Van Wyck, Ida McAuley, Margaret Shear, Ebenezer McBurney, Julia Ash, Sarah Thompson, Catharine Gault, Eliza Monzingo, Martha Crawford, Henry B. Shields, The Home of the Friendless, The Home for Aged Protestant Women, their executors, administrators, successors, or assigns, in the sum of twenty-five thousand dollars, lawful money of the

United States of America; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 21st day of February, A. D. 1889.

Whereas Alexander M. Byers has appealed to the Supreme Court of the United States from the final decree of the circuit court of the United States in the above action:

Now, the condition of this obligation is such that if said
216 Alexander M. Byers shall prosecute his appeal to effect and if he fail to make his plea good shall answer all damages and costs, with just damages for delay and costs and interest on the appeal, then this obligation shall be void; otherwise to be and remain in full force and virtue.

ALEXANDER M. BYERS. [SEAL.]
J. KIDD FLEMING. [SEAL.]
E. M. BUTZ. [SEAL.]

Signed and seal- in the presence of—
L. H. MATHEWS.

UNITED STATES OF AMERICA,
Western District of Pennsylvania, City of Pittsburgh, } ss:

Alexander M. Byers, J. Kidd Fleming, and E. M. Butz, each being duly sworn, say that the sureties on the above bond are each worth the amount thereof over and above their just debts and liabilities and the property exempt by law from levy and sale on execution.

ALEXANDER M. BYERS.
J. KIDD FLEMING.
E. M. BUTZ.

Sworn and subscribed before me this 21st day of February, 1889.

[L. S.] L. H. MATHEWS,
Notary Public.

And now, Feb'y 23, 1889, the within bond is approved.

BY THE COURT.

Filed Feb'y 23, 1889.

H. D. GAMBLE, *Clerk.*

217 *Return of Examiner.*

In the Circuit Court of the United States for the Western District of Pennsylvania.

HENRY B. SHIELDS *et al.*
vs.
ROBERT F. MCAULEY *et al.* } No. 19. May Term, 1887.

Order of Court.

And now, to wit, February 23rd, 1889, the court allow Geo. B. Motheral, special examiner, to file as a part of his return of testimony, filed May 23rd, 1888, an exemplification of the record of the orphans' court of Allegheny county, Pennsylvania, at No. 112, March term, 1887, showing at length the proceedings in said court.

BY THE COURT.

In the Circuit Court of the United States for the Western District of Pennsylvania.

HENRY B. SHIELDS *et al.*
vs.
ROBERT F. MCAULEY *et al.* } No. 19. May Term, 1887.

It is hereby agreed by the counsel representing all parties interested in the above-entitled action that an exemplification of the record of the proceedings in the orphans' court of Allegheny county, Pennsylvania, in the estate of Mary McAuley, deceased, shall be filed as a part of the testimony taken before Geo. B. Motheral, special examiner, in this, it having been offered in evidence before him.

218 Pittsburgh, Penna., February 19th, 1889.

KNOX & REED,
Att'ys for Pl'ffs.
WM. M. WATSON,
SOL. SCHOYER, JR.,
Att'ys for Dora McAuley et al.
THOS. PATTERSON,
Att'y for Home for the Friendless.
E. P. & C. W. JONES,
Att'ys for R. F. McAuley et al.
D. F. PATTERSON,
Att'y for Ebenezer McBurney et al.
H. & G. C. BURGWIN,
Attorneys for Home for Aged Protestant Women.
D. T. WATSON,
Att'y for A. M. Byers, Adm'r.
LYON & SHOEMAKER,
Att'ys for Eliza Paul et al.

In the Orphans' Court in and for Allegheny County, State of Pennsylvania.

In the Matter of the Estate of MARY MCAULEY, Dec'd. No. 112. March Term, 1887.

Among the records of the orphans' court in and for the county of Allegheny, State of Pennsylvania, the following will be found of record and on file at No. 112, March term, 1887:

Docket Entries.

MARY MCAULEY, Dec'd. No. 112. March Term, 1887.

First and partial account of A. M. Byers, administrator *c. t. a.* of estate of Mary McAuley, dec'd.

219 Balance in hands of acc'nt, $212,235.61.

And now, March 7th, 1887, the register, after due and legal advertisement, having presented the within account, it is confirmed *nisi sec. reg.*

PER CURIAM.

March 18, 1887.—Confirmed absolutely *sec. reg.*

PHILIP HOERR, *Clerk.*

March 21st, 1887.—The said account is placed on the audit list for the purpose of distribution and the case is set down for hearing on the 29 day of March, 1887.

March 29, 1887.—Heard in part.

May 5th, 1887.—Plea of A. M. Byers, adm'r *c. t. a.*, filed, showing that on the 28th day of March, 1887, Henry B. Shields, resident and citizen of the State of Ohio, and claiming to be entitled to participate in the distribution of the property of said decedent, filed in the circuit court of the United States for the western district of Penna. a bill in equity against accountant and others, of which said bill a copy is hereto attached and made part of this plea; and that a subpœna was issued by said court in pursuance of the prayer of said bill and served upon petitioner March 28th, 1887, and the pendency of the said bill in equity in said court and the proceedings taken thereunder; this accountant and administrator doth now and here plead to the further jurisdiction of this court and to any further proceedings in the matter of the administration of distribution of the estate of Mary McAuley, deceased, and prays the judgment of this court whether it ought to proceed any further in the matter.

ALEX. M. BYERS,
Adm'r C. T. A.

Copy of bill filed.

220 May 14th, 1887.—Objections of John M. McAuley *et al.* to plea filed.

May 21, 1887.—Plea and petition of A. M. Byers, adm'r, filed, showing that on the 26th day of May, 1887, the circuit court of the

United States for western district of Penna. held and decided that said circuit court had jurisdiction of the matters and things averred in the said bill of Henry B. Shields *et al.*, and that the orphans' court had not required jurisdiction. Petitioner therefore prays the judgment of this court whether it will or should proceed further in the premises.

A. M. BYERS, *Adm'r.*

Petition of A. M. Byers, adm'r, presented, asking court to make an order authorizing him to make the exchange of Citizens' Passenger Railway Company stock for Traction Company filed.

Dec. 17, 1887.—Hearing filed for Dec. 24, 1887.

Dec. 24, 1887.—Proof of service of notice to counsel filed.

And now, Dec. 23, 1887, notice having been duly given to all the counsel of record in this case, this matter came on to be heard and, upon consideration thereof, the court do authorize the adm'r to accept the offer contained in the within letter and to exchange for seven shares of Citizens' Traction Co. stock one share of Citizens' Passenger Railway Company stock he holds, and after the exchange to hold the Citizen-' Traction Company stock as assets of the estate of Mary McAuley, deceased.

PER CURIAM.

A true copy of docket entries from the record.
Attest:

—— ——.

221 *First and Partial Account of Alexander M. Byers, Administrator C. T. A. of the Estate of Mary McAuley, Deceased.*

Said accountant charges himself with the appraised value of all the items comprising said estate as shown in the inventory and appraisement filed February 8, 1886, and also with the income derived therefrom to January 29, 1887, and also with gains on stocks and other effects of and belonging to the said estate sold over and above their appraised value, to wit:

1886.				
Feb.	8.	Net amount of inventory and appraisement filed		$220,585 83½
		Income:		
Mar.	18.	Dividend from Mechanics' National bank	$297 50	
"	"	" " " " " "	297 50	
"	"	Dividend from Citizens' Passenger Railway Co.	625 00	
"	"	Dividend from Allegheny Bridge Company	437 50	
"	"	" " " "	500 00	
"	"	Interest on promissory note for $5,000.00	325 00	
May	31.	Dividend from Citizens' Passenger Railway Co.	625 00	
"	"	Dividend from Iron City National bank	1,148 00	
Nov.	20.	" " " "	1,148 00	
Dec.	13.	Dividend from Mechanics' National bank	297 50	
222				
Dec.	13.	Dividend from Citizens' Passenger Railway Co.	500 00	
"	"	Dividend from Allegheny Bridge Company	437 50	
"	"	Dividend from Pittsburgh Gas Company	330 00	
"	"	" " " "	330 00	

1887.				
Jan.	14.	" " " "	330 00	
"	"	Dividend from Mechanics' National bank	297 50	
"	"	Dividend from Allegheny Bridge Company	500 00	
"	29.	Interest on bank balance to this date, at 2 per cent. per annum	2,112 66	
"	"	Dividend, July, 1885, from Pittsburgh Gas Co.	330 00	
				$10,868 66
1886.		Gains:		
May	1.	On jewelry sold as follows:		
"	"	One pair diamond earrings, sold for $75; appraised at $70.00	5 00	
		One clustre diamond pin, sold for $40; appraised at $35.00	5 00	
		One large solitaire diamond ring, sold for $35.00; appraised at $30.00	5 00	
Dec.	20.	On 72 shares Iron City National Bank stock, sold at $85 per share; appraised value, $75.00 per share	720 00	
				$735 00
				$232,189 49½

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The said accountant takes credit as follows:
For payments made on account of said estate, to wit:

1886.				
Jan.	6.	Obituary notices in the following newspapers: Penny Press, Dispatch, Commercial Gazette, Post, Times, Leader, Chronicle-Telegraph, $1.50 each	10 50	
"	6.	Moving furniture at Monongahela house	3 00	
"	25.	Mrs. Mary Orr's bill of washing for deceased	2 00	
Feb.	9.	Andrew Fleming, M. D., professional services	10 00	
"	18.	H. B. Orr, M. D., " "	15 00	
		Miss Mary McAuley, as per Schedule "B," hereto attached	95 96	
Mar.	18.	H. Samson, undertaker's bill	579 00	
"	"	Notice of administration, Commercial Gazette	8 00	
"	"	Notice " Chronicle-Telegraph	6 00	
"	"	George S. Griscom, rooms, &c., for deceased at Monongahela house, P'gh	228 16	
"	"	Register's fees, $15.00,; swearing appraisers, 50c.	15 50	
Apr.	5.	Peter Dressler, coroner's fees	15 00	
"	6.	Collateral inheritance tax	9,855 71	
"	7.	William McKibben, professional services	100 00	
Jun-	5.	J. Rogers, M. D.	5 00	

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Dec.	29.	H. Kleber & Bro., storage on piano	22 00	
1887.				
Jan.	27.	D. T. Watson, Esq., professional services	1,800 00	
		Accountant's commission, 5 per cent., on income derived from the estate to Jan'y 29, 1887, $10.868.66	543 43	
		Accountant's commission on appraised value of the estate and gains over appraisement, $221,320.83½	6,639 62½	
				19,953 88½
		Balance in hands of administrator as per Schedule "A," hereto attached		$212,235 61½
				$232,189 49½

STATE OF PENNSYLVANIA, } ss:
Allegheny County, }

Personally before me came A. M. Byers, who, being by me duly sworn, says that the above account is correct and true.

ALEX. M. BYERS.

Sworn — and subscribed this 29th day of Jan'y, 1887, *coram*—
PHILIP HOERR, *Reg'r.*

"A."

Schedule of effects remaining in the hands of Alexander M. Byers, administrator *c. t. a.* of the estate of Mary McAuley, deceased,
225 at the filing of his first and partial account as of date January 29, 1887, to wit:

502 shares Iron City National bank stock @ $75 per share, appraised value	$37,650 00
119 shares Mechanics' National bank stock @ $80 per share, appraised value	9,520 00
250 shares Citizens' Passenger Railway Co. stock @ $83⅓ per share, appraised value	208,833 33
250 shares Allegheny Bridge Co. stock @ $50 per share, appraised value	12,500 00
220 shares Pittsburgh Gas Co. stock @ $40 per share, appraised value	8,800 00
Mortgage on real estate	5,000 00
One promissory note	10,000 00
One oil painting, landscape	8 00
One oil painting, "	15 00
One oil painting, masquerade	10 00
One oil painting, cattle scene	10 00
Two bronze ornaments, $15 each	30 00
One small mirror	50
Photographic views and portraits	1 00
Unbound books and magazines	25
Two walking-canes and one umbrella	1 00
One album, 25c.; one work box, 25c.; one duster, 5c.; two vases and card receiver, 25c.; one powder box, 10c.	80
One inkstand, 10c.; three match boxes, 15c.; one marble weight, 15c.	40
Sixty volumes bound and half-bound books	6 00
Two old trunks	1 00
Ladies' wearing apparel, consisting of clothes,
226 bonnets, fans, shoes, and bed linnen	150 00
Bed-room furniture, 2 tables, 4 chairs, 1 rocking chair, 1 lounge	50 00
One piano-forte	75 00
Lot of tableware	50 00

One penknife, 25c.; tortoise-shell eyeglasses, 25c.; two pocket-books and two purses, 25c.	75
One razor, 5c.; three boxes trinkets, $5.00	5 05
One set jet gold trimmings, breastpin, two pieces earrings and cross	2 00
Two breastpins, pearl and amber	10
One gold watch and two chains	20 00
One pair gold spectacles and two pair gold eyeglasses	5 00
One gold thimble	2 00
One linen portfolio, one deposit Iron City check book, one mosaic pin, broken	1 00
One pocket-book, with memorandum of bequest; one set hair jewelry	1 00
One set common jewelry	1 00
One plain gold ring	90
One small solitaire diamond ring	10 00
One diamond ring, garnet centre of cluster	15 00
One diamond stud	25 00
Cash	107,434 53
	$212,235 61

227 "B."

Expenses Incident to the Decease and Burial of Miss Mary McAuley.

Washing body of deceased and general attendance	$35 00
Flowers	18 25
Sitting in room with body of deceased	25 00
Servants	13 00
Telegrams to relatives announcing her decease	4 71
	$95 96

And now, to wit, March, 7, 1887, the register, after due and legal advertisement, having presented the within account, it is confirmed *nisi*.

PER CURIAM.

Estate of Mary McAuley, dec'd.
March 29th, 1887.

Doctor JOHN MCAULEY sworn.

Ex. by Mr. KENNEDY:

I reside in Newark, N. J.; am a cleryman; knew Mary McAuley, the decedent; she lived in my house for many years; she was my first cousin. Her father was John McAuley, and Thomas McAuley, my father, was his full brother. I know her next of kin on her father's side.

She was unmarried; her father and mother died before her; she left neither brother nor sister — survive her nor paternal uncles or aunts. She died 6th January, 1886.

William McAuley was her father's eldest brother; of his children two are living—Robert Forest McAuley, Kingston, N. Y.; Mrs. Susan Blakeley, East Meredith, N. Y. They were the only children living at her death.

Thomas McAuley, brother to her father, left one child—myself, John McAuley—living at her death.

228 Doctor Samuel McAuley, of N. Y. city, brother to her father, left but one child, Mrs. Margaretta Shears, widow, of N. Y. city, living at her death.

John McAuley's (decedent's father) children died prior to her, leaving no children.

James McAuley, a half brother to John McAuley, decedent'- father, died leaving two children, who survived decedent, to wit, Mr. James McAuley, of Olathe, Kansas, and Duncan Turner McAuley, of Hancock Co., Illinois.

Her father had two sisters, Eliza Wilson and Mrs. Gillespie. The first died leaving no children and the second died leaving no children — survive decedent.

There are four first cousins of the full blood and two of the half blood on the paternal side, viz:

Robert Forrest McAuley.
Mrs. Susan Blakely.
John M. McAuley.
Mrs. Margaretta Shearers.
James McAuley.
Duncan Turner McAuley.

Decedent's mother's maiden name was McBurney.

EBENEZER MCBURNEY sworn:

Ex. by Mr. D. F. PATTERSON:

Knew decedent intimately and her brothers and sisters. None of them survived her, nor did they leave children — survive her. She died without leaving children; was never married. John McAuley was her father. Mary McBurney was her mother; both died

229 prior to her. She left maternal first cousins — survive her.

Alex. McBurney, brother to her mother, left two children — survive her, viz., Ebenezer McBurney, of Ohio, and Mrs. Mary Ash, of Greenfield, Mercer Co., Pa.

James McBurney, brother of her mother, left three children — survive her, viz:

Mrs. Sarah Thompson, of Mercer Co., Pa.

Mrs. Catherine Gault, of Mercer Co., Pa., and myself, Ebenezer McBurney, of Washington, Pa.

Jane Gillespie, sister decedent's mother, left one child to survive her, Eliza A. B. Monzingo, Page Co., Iowa.

Martha Mathews, sister to decedent's mother, left one child, Mrs. Martha Crawford, of Peters t'w'p, Washington Co., wife of Andrew Crawford.

Mrs. Mathews had a son, James Mathews, who died latter part of

Dec., 1885, and was buried Jan. 1st, 1886. I was at his funeral; I knew him well.

Decedent left seven maternal first cousins, viz:

Ebenezer Magoffin McBurney.
Mrs. Julia Ash.
Ebenezer McBurney.
Sarah Thompson.
Catharine Gault.
Eliza A. B. Monzingo.
Mrs. Martha Crawford.

Decedent lived in the city of Pittsburgh; died at the Monongahela house.

230 APRIL 7TH, 1887.

ELIZA PAUL sworn:

Mr. Lyon proposes to prove by the witness the kinship of certain persons who were second cousins of the decedent for the purpose of showing that they were entitled to participate in the distribution.

Mes-rs. Kenedy and Jones, representing first cousins, object as incompetent and irrelevant; that the offer shows that they have no interest in estates and are not entitled to participate in the distribution.

Testimony taken subject to the objection.

Thomas McAuley was the oldest son of William McAuley, who was uncle to decedent, and he died without issue.

James McAuley, 2nd son of Wm., dec'd, and left two children, Eliza Egbert and Thomas McAuley.

John, 3rd son of William, is dead, leaving two children (I was raised in William McAuley's family), Mary Montgomery, of Chicago; Margaret Ann Payne, of —.

Eliza, daughter of Wm. McAuley, died leaving -our children, Eliza Paul, Mary Parker, William Parker, and Jane Stevens.

Ann Campbell, daughter of William McAuley, died leaving six children.

Samuel Hill, N. Y. city.
Robert F. Campbell, N. Y. city.
Mary Douglass, N. Y. State.
Annie McCausland, N. Y. State.
James Campbell, Nebraska.
Theresa Campbell, Africa.

231 David, son of William McAuley, died leaving one son, who died leaving two daughters, Susan McAuley and Harriet McAuley.

Ex. by Mr. WATSON:

James McAuley, uncle to decedent, had a son, William McAuley, lived — Courtright, Delaware Co., N. Y. He died in 1851; had 16 children. I was born in 1822.

MAY 5TH, 1887.

ELIZABETH CALDWELL sworn:

Ex. by Mr. WATSON:

I reside in Allegheny county; am a daughter of James Mathews, deceased; he was a full cousin of decedent and died before her. My father left ten children:

Nancy Ross.
Martha Fisher.
Clara Milholland.
J. E. Mathews.
Elizabeth Caldwell.
L. H. Mathews.
W. A. Mathews.
A. L. Mathews.
Sarah McMurray.
C. G. Mathews.

All of age, are living, except Mrs. Fisher, who died since decedent.

Mr. Patterson objects to the foregoing testimony as immaterial.

232 In the Orphans' Court of Allegheny County, Pennsylvania.

In Re Estate of MARY MCAULEY, Deceased. No. 112. March Term, 1887.

And now, May 5th, 1887, comes Alexander M. Byers, administrator with the will annexed of all and singular the goods and chattels of Mary McAuley, deceased, and shows to this honorable court that heretofore, to wit, on the 28th day of March, 1887, Henry B. Shields, claiming to be a resident and citizen of the State of Ohio and entitled to participate in the distribution of the property of said decedent, filed in the circuit court of the United States for the western district of Pennsylvania a bill in equity against the accountant and others, of which said bill a copy is hereto annexed and made part of this plea, and that a subpœna was issued by said circuit court in pursuance of the prayer of said bill and served upon your petitioner on the said 28th day of March, 1887.

And the pendency in equity in said circuit court of the United States and the proceedings taken thereunder this accountant and administrator doth now and here plead to the further jurisdiction of this court and to any further proceedings in the matter of the administration or distribution of the estate of Mary McAuley, deceased, and prays the judgment of this honorable court whether it ought to proceed any further in this matter.

ALEXANDER M. BYERS,
Adm'st'r C. T. A.

233 STATE OF PENNSYLVANIA, }
County of Allegheny. }

Personally, before me, came Alexander M. Byers, the party who makes the within plea or petition, who, being by me duly sworn,

says that the same is not presented or filed or made for the purpose of delay, and that the statements therein contained are true.

ALEXANDER M. BYERS.

Sworn and subscribed before me this 4th day of May, A. D. 1887.

L. H. MATHEWS,
Notary Public.

In the Circuit Court of the United States for the Western District of Pennsylvania. No. 19. May Term, 1887. In Equity.

To the honorable the judges of the said court:

HENRY B. SHIELDS, resident and citizen of the State of Ohio, assignee of James McAuley, a resident and citizen of the State of Kansas, and Henry B. Shields, in right of his wife, Melissa M. Shields, also a resident and citizen of the State of Ohio, bring this their bill

against

ROBERT T. MCAULEY, MARY DOUGLASS, SUSAN BLAKELY, SARAH M. Hill, Robert F. M. Campbell, Mary Parker, and Jane Stewart, all citizens of the State of New York; Rev. John McAuley, a citizen of the State of New Jersey and resident therein; Martha Jane McGogney and William B. McGogney, her husband; Margar-
234 P. Hugus and N. H. Hugus, her husband; Catherine Watson, Dr. William Watson, Wilson Stewart Watson, James M. Watson, Julia Ash, Ebenezer McBurney, Kate Gault, Sarah Thompson, Martha Crawford, Ebenezer McBurney, all citizens and residents of the State of Pennsylvania; William Parker, a resident and citizen of the State of Iowa; Eliza Paul, Rilla Wilson, and Dr. J. M. Wilson, her husband; Mary Montgomery, and Dora McAuley, all residents and citizens of the State of Illinois; Eliza A. Egbert and Thomas McAuley, residents and citizens of the State of California; James Campbell, a resident and citizen of the State of Nebraska; Thomas M. Watson, a resident and citizen of the State of Alabama; Margaret Ann Payne, a resident and citizen of the State of Minnesota; Anne McCauslin, whose residence is to your orators unknown, none of whom are residents or citizens of the State of Ohio; Mrs. —— Zanningo, a resident and citizen of the State of Iowa, heirs-at-law of Mary McAuley, late of the city of Pittsburgh, in the State of Pennsylvania, deceased, and Alexander M. Byers, administrator *cum testamento annexo* of the estate of said Mary McAuley, deceased, said Alexander M. Byers being a citizen of the State of Pennsylvania and residing in the city of Allegheny, in the county of Allegheny, in said State and in the district aforesaid; "The Home of the Friendless" and the "Home for Protestant Destitute Women," both corporations of the State of Pennsylvania, operating within the western district thereof.

And thereupon your orators complain*t* and say:

1. That Mary McAuley, late of the county of Allegheny, in the

western district of Pennsylvania, deceased, died on the sixth
235 day of January, A. D. 1886, and until and at the time of her death was a citizen of the State of Pennsylvania aforesaid and resident within the western district thereof.

That said Mary McAuley died unmarried, without issue or lineal descendants, father or mother, brother or sister, uncle or aunt, nephew or niece, or any issue of nephew or niece, and leaving to survive her as one of heirs-at-law a first cousin, James McAuley, a citizen of the State of Kansas, and now residing therein, who by writing duly signed and sealed since the death of said Mary McAuley assigned for value all his interest in all the estate, real, personal, and mixed, whereof said Mary McAuley died seized or possessed unto Henry B. Shields, one of your orators, who is a resident and citizen of the State of Ohio, and your said orators' interest in said estate greatly exceeds the sum of three thousand dollars over and above interest and costs. The said Mary McAuley left also to survive her the other one of your orators, to wit, Melissa M. Shields, who is also a resident and citizen of the State of Ohio, and also the parties defendant in this bill, whose named and residences and citizenship, so far as ascertained by your orators, are as alleged in the stating part thereof, together with other persons as yet to your orators unknown, none of whom are residents in or citizens of the State of Ohio.

2. That on the twelfth day of January, A. D. 1886, a writing purporting to be the last will and testament of said Mary McAuley, deceased, was offered for probate in said county of Allegheny by A.
M. Byers, one of the defendants to this bill, and was ad-
236 mitted by the register of wills of said county without notice to your orators and upon a declaration by said A. M. Byers then made that said probate of said alleged will should be without prejudice to any of the rights of the parties interested in said estate, as your orators are informed and believe and aver to be true, and thereupon said register issued to said A. M. Byers letters of administration *cum testamento annexo* upon the estate of said decedent, who thereupon gave bond in the sum of four hundred thousand dollars and qualified as administrator aforesaid; but your orators aver and charge that said alleged probate was not in accordance with the laws of the State of Pennsylvania and was not a legal probate of said will.

3. Your orators aver that the paper purporting to be the last will and testament of said Mary McAuley, deceased (a copy of which alleged will is hereto attached and marked Exhibit No. 1), was not executed within the time required by the act of the General Assembly of the State of Pennsylvania, approved the 26th day of April, A. D. 1855, entitled "An act relating to corporations and to estates held for corporate, religious, and charitable uses," and that therefore the bequests to the said defendants, "The Home of the Friendless" and the "Home of Protestant Destitute Women," both of which are charitable institutions within the meaning of said act of assembly, have lapsed and become void, and said alleged will solely relating thereto is null and void.

4. That the said Mary McAuley died seized of a large estate partly realty and partly personalty, and the said A. M. Byers, administrator as aforesaid, has not proceeded in accordance
237 with the laws of the State of Pennsylvania aforesaid in the administration of said personal estate, and has not filed within the register's office of said county of Allegheny a full and true account of any such administration nor within the time required by said laws.

5. That the real estate of said decedent is situate wholly within the said county of Allegheny and yields a considerable income, the collection of which is not now attended to by any duly authorized person.

6. That claiming the estate of said Mary McAuley, deceased, are two classes of claimants, viz., the first and the second cousins of said decedent; that your orator, Henry B. Shields, claims a first cousin's share as the assignee of James McAuley, a first cousin as aforesaid, and Melissa M. Shields aforesaid, and your orator in right of said Melissa M. Shields *are* entitled to a second cousin's share in said estate, the said Melissa being a daughter of a deceased first cousin of said Mary McAuley, deceased, and that of the parties defendant in this bill some are first cousins and some are second cousins of said decedent.

That grave and difficult questions have arisen and will arise amongst the claimants to said estate in the settlement and distribution thereof.

Wherefore your orators need equitable relief and pray your honorable court as follows:

1st. That the said alleged probate of said alleged will of said Mary McAuley, deceased, be declared void and of no effect.

2nd. That the bequests in said alleged will be declared lapsed and the said alleged will declared null and void.

238 3rd. That the said A. M. Byers be enjoined and restrained by your honorable court from in any manner selling or disposing of said real estate and from collecting the rents and profits thereof, and that your honorable court will appoint some suitable person to take hold of and manage said real estate until partition thereof can be duly had and to receive the profits thereof.

4th. That your honorable court will order, direct, and decree that a partition of said real estate be had and made to and among your orators and the other parties in interest therein.

5th. That the said A. M. Byers be ordered and directed to make a full, just, and true account of all stock, money, and other assets of said estate that may have come into his hands, and that an account be taken of said testator's debts and funeral expenses, and that the surplus of said estate, after paying all the debts and expenses of said estate, be distributed to and among your orators and such other persons as may be found to be legally entitled thereto, and that until such final decree of your honors in this case for such distribution the said A. M. Byers be enjoined and restrained from paying out or distributing to any person any money or valuable thing belonging to said estate or in any manner disposing thereof.

6th. That your honors will grant such other and equitable relief as to your honors may seem meet and proper.

7th. That your honors will grant a writ of subpœna, to be
239 directed to all the above-named defendants, commanding them and each of them, at a certain day and under a certain penalty, to be and appear before this court and then and there full, true direct, and perfect answers to make to all and singular the premises, and further to stand to, perform, and abide such further order, direction, and decree as to your honors shall seem meet.

And your orators will ever pray, &c.

HENRY B. SHIELDS,
HENRY B. SHIELDS,
In Right of Melissa Shields.

KNOX & REED,
Sol's for Compl'ts.

STATE OF PENNSYLVANIA, } ss:
Western District, }

Personally before me came the above-named Henry B. Shields, who, being duly sworn according to law, says that the statements set forth in the foregoing bill of complaint, so far as they are stated on information received from others, he believes them to be true.

HENRY B. SHIELDS.

Sworn and subscribed this 28 day of March, A. D. 1887, *coram*—
H. D. GAMBLE, *Clerk.*

EXHIBIT No. 1.

"By the request of my dear brother my house on Duquesne way is to be sold at my death and the proceeds to be divided between
240 the Home of the Friendless and the Home for Protes- Destitute Women.

"(Signed) MARY McAULEY."

Plea of A. M. Byers, Adm'r. Filed May 5, 1887.

In the Orphans' Court of Allegheny County. No. 112. March Term, 1887.

In the Matter of the Estate of MARY McAULEY, Deceased.

And now, to wit, May 14th, 1887, come John McAuley, Duncan T. McAuley, Robert F. McAuley, Susan Blakeley, Martha Shearers, Ebenezer M. McBurney, Ebenezer McBurney, Sarah Thompson, Catharine Gault, Eliza Monzingo, and Martha Crawford, by their respective attorneys, John M. Kenedy, E. P. Jones, John W. Donnan, James M. McBurney, and D. F. Patterson, and object to and deny the sufficiency of the plea of Alexander M. Byers, administra

tor, &c., as a bar to further proceedings in this court and pray that said plea may be set down for argument as to its legal sufficiency.

JOHN M. KENNEDY.
E. P. JONES.
JOHN W. DONNAN.
JAMES M. McBURNEY.
D. F. PATTERSON.

Filed May 14, 1887.

241 In the Circuit Court of the United States for the Western District of Pennsylvania. No. 19. May Term, 1887. In Equity.

HENRY B. SHIELDS, a resident and citizen of the State of Ohio, assignee of James McAuley, a resident and citizen of the State of Kansas, and Henry B. Shields in right of his wife, Melissa M. Shields, also a resident and citizen of the State of Ohio,

against

ROBERT T. MCAULEY, MARY DOUGLASS, SUSAN BLAKELEY, SARAH M. Hill, Robert R. M. Campbell, Mary Parker, Jane Stewart, all citizens of the State of New York; Rev. John McAuley, a citizen of the State of New Jersey and resident therein; Martha Jane McGogney and William McGogney, her husband; Margaret P. Hugus and N. H. Hugus, her husband; Catherine Watson, Dr. William Watson, Wilson Stewart Watson, James M. Watson, Julia Ash, Ebenezer McBurney, Kate Gault, Sarah Thompson, Martha Crawford, Ebenezer McBurney, all citizens and residents of the State of Pennsylvania; William Parker, a citizen and resident of the State of Iowa; Eliza Paul, Rilla Wilson and Dr. J. M. Wilson, her husband; Mary Montgomery and Dora McAuley, all residents and citizens of the State of Illinois; Eliza A. Egbert and Thomas McAuley, residents and citizens of the State of California; James Campbell, a resident and citizen of the State of Nebraska; Thomas M. Watson, a resident and citizen of the State of Alabama; Margaret Ann Payne, a resident and citizen of the State of Minnesota; Anne McCauslin, whose resi-

242 dence is unknown; none of whom are residents or citizens of the State of Ohio; Mrs. —— Zanningo, a resident and citizen of the State of Iowa, heirs-at-law of Mary McAuley, late of the city of Pittsburgh, in the State of Pennsylvania, deceased, and Alexander M. Byers, administrator *cum testamento annexo* of the estate of Mary McAuley, deceased, said A. M. Byers being a citizen of the State of Pennsylvania; "The Home of the Friendless," and the "Home for Protestant Destitute Women," both corporations of the State of Pennsylvania, operating within the western district thereof.

The plea of Alexander M. Byers, administrator with the will annexed of all and singular the goods and chattels which were of Mary McAuley, deceased.

This defendant, by protestation, not confessing or acknowledging

all or any of the matteers or things in said complainants' bill of complaint mentioned and contained to be true in such manner and form as they are therein set forth and alleged, for plea to the said bill says—

That heretofore, to wit, on the 29th day of January, 1887, this respondent, as administrator of all and singular the goods and chattels which were of Mary McAuley, late of the county of Allegheny, in the State of Pennsylvania, deceased, as in and by the statutes of the said State in such case made and provided he was bound to do, filed his account of all and singular the said goods before the register in and for the said county of Allegheny and State of Pennsylvania, who had jurisdiction of the same, and thereupon the said register passed upon said account, and then and there, as pro-
243 vided by the statute, gave notice to all persons in interest by advertisement that the said register would present the said account on the 7th day of March, 1887, to the orphans' court of Allegheny county for examination and approval, the said court, under the statute of the State of Pennsylvania, having exclusive jurisdiction thereof.

That the said account afterwards, to wit, on the 7th day of March, 1887, was presented to the said orphans' court of the said county of Allegheny, and was by said court confirmed and approved *nisi*, and under the practice of the said court the said confirmation *nisi* became absolute unless exceptions thereto were filed within ten days' time from the confirmation of the said account *nisi*, to wit, on or before the 18th day of March, 1887.

That no exceptions were filed to the said account and on the 18th day of March, 1887, the confirmation thereof became absolute; that the said account showed upon its face the entire personal property of the decedent and all sums of money received by this administrator from the same, and also showed the entire expenditure of this respondent as administrator as aforesaid, leaving a balance in the hands of respondent as administrator for distribution amounting to a large sum, to wit, the sum of two hundred and twelve thousand two hundred and thirty-five and sixty-one one-hundredths ($212,235.61) dollars, the same being partly in cash and partly in personal property of the decedent.

That afterwards, to wit, on the 21st day of March, 1887, the said account, thus confirmed and approved, was placed upon the audit list of the said court for the purpose of hearing
244 and distributing the balance shown by the said account to be in the hands of this respondent as administrator to and among such persons as are entitled thereto, and a day for the hearing thereof was fixed by the said court, to wit, on the 29th day of March, 1887, and that the orphans' court, under the laws of the State of Pennsylvania, had exclusive jurisdiction of the said hearing and distribution.

That said orphans' court had thus acquired jurisdiction of your respondent and of the estate of the said Mary McAuley, deceased, and of the distribution of the balance shown to be in your respondent's hands as administrator, and of the various matters and things

involved in said account; a true copy of which account is hereto annexed and made part of this plea; and that the said jurisdiction was thus acquired prior to the filing of the bill of complaint in this court by the said complainants.

That the said orphans' court by virtue of its jurisdiction as aforesaid is proceeding to distribute the property of the said decedent in the hands of this respondent as administrator as aforesaid to and among such persons as shall be entitled thereto.

Wherefore this respondent does plead the said matters and things to the jurisdiction of this court, and prays the judgment of this court whether he ought to make any further or other answer to the said bill of complaint.

ALEX. M. BYERS,
Administrator C. T. A.

UNITED STATES OF AMERICA, }
Western District of Penna., } *ss:*

245 Personally before me came the above-named respondent, who, being by me duly sworn, says that the above plea is not filed for the purpose of delay, and that the statements therein contained are true.

ALEX. M. BYERS.

Sworn and subscribed before me this 10th day of May, 1887.

L. H. MATHEWS,
[L. S.] *Notary Public.*

In the Orphans' Court of Allegheny County.

In the Matter of the Estate of MARY MCAULEY, Deceased. No. —. March Term, 1887.

To the honorable the judges of the said court:

The further plea and petition of Alexander M. Byers, administrator of all and singular the goods and chattels which were of Mary McAuley, deceased, respectfully shows—

That since the filing of the bill in this case, to wit, on the 10th day of May, 1887, this petitioner filed in the circuit court of the United States for the western district of Pennsylvania, to No. 19, May term, 1887, in equity, a plea to the jurisdiction of the said court in the said case of Henry B. Shields *et al. versus* your petitioner and others, setting up that the orphans' court of Allegheny county, Pennsylvania, had acquired jurisdiction of all and singular the matters and things charged in the said bill in equity prior to the filing of the said bill in the circuit court of the United States, and pleading the same to the jurisdiction of the said circuit court; a copy of which said plea is hereto annexed and made part thereof.

246 That it was then and there agreed between the parties to the case that the said plea should be regarded and taken as answering the entire bill, and that the said plea should be set down

for a hearing and disposed of upon its merits and not upon technical grounds; that the said plea was set down for hearing and was duly argued by counsel, and the said circuit court took the same under consideration, and afterwards, to wit, on the 26th day of May, 1887, the said circuit court of the United States for the western district of Pennsylvania overruled the said plea and held and decided that the said circuit court of the United States had jurisdiction of the matters and things averred in the said bill, and that the orphans' court of the county of Allegheny had not acquired jurisdiction of the said matters and things or any of the same so as to oust the jurisdiction of the said circuit court.

And this petitioner, showing to this honorable court that the said circuit court of the United States is proceeding to a hearing and decision and determination of the various matters and things charged in the said bill, a copy of which said bill was annexed to the former plea filed in this case, prays the judgment of this court whether it will or should proceed further in the premises.

ALEXANDER M. BYERS,
Administrator.

STATE OF PENNSYLVANIA, } ss:
County of Allegheny, }

Personally before me came Alexander M. Byers, who, being by me duly sworn, says that the statements contained in the
247 foregoing petition and plea are correct and true and that the same is not filed for the purpose of delay.

ALEXANDER M. BYERS.

Sworn and subscribed before me this 21st day of May, A. D. 1887.

L. H. MATHEWS,
Notary Public.

Filed May 21, 1887.

In the Orphans' Court of Allegheny County, Pennsylvania.

In the Matter of the Estate of MARY MCAULEY, Deceased. No. 112 of March Term, 1887.

To the honorable the judges of the said court:

Your petitioner respectfully shows—

That on the 3rd day of December, 1887, he presented a petition, of which the annexed is a copy, to the circuit court of the United States for the western district of Pennsylvania, and, upon due consideration thereof, an order was made, a copy of which is endorsed on the copy of said petition.

That he is advised that it is important for him to submit his action in this respect to this honorable court, and he therefore now and here restates the averment in his petition in the circuit court of the United States and asks this honorable court to make an order authorizing him to make the exchange of Citizens' Passenger

248 Railway Company stock for Traction Company stock, as authorized in said recited order.

And he will ever pray, &c.

A. M. BYERS,
Administrator Mary McAuley, Dec'd.

STATE OF PENNSYLVANIA, }
County of Allegheny, } *ss:*

Personally before me, a notary public within and for said county, came the above-named A. M. Byers, who, being by me duly sworn according to law, says that the statements contained in the foregoing petition are correct and true.

A. M. BYERS.

Sworn and subscribed before me this 17th day of December, 1887.

A. P. BURGWIN,
Notary Public.

We hereby consent that the above order as prayed for be made.

D. F. PATTERSON.
E. P. & C. W. JONES.

In the Circuit Court of the United States for the Western District of Pennsylvania.

HENRY B. SHIELDS *et al.*
vs.
A. M. BYERS, Administrator of All and Singular the Goods and Chattels, &c., of Mary McAuley, Deceased.

No. 19. May Term, 1887. In Equity.

249 To the honorable the judges of the said court:

The petition of A. M. Byers, administrator of all and singular the goods and chattels of Mary McAuley, late of the county of Allegheny, deceased, respectfully shows—

That this honorable court has taken jurisdiction of your petitioner as administrator and of the assets of the decedent which your petitioner has in his hands.

That among those assets are two hundred and fifty shares of the capital stock of the Citizens' Passenger Railway Company, a corporation of the State of Pennsylvania engaged in the operation of a street passenger railway in the city of Pittsburgh.

That your petitioner, on the 1st day of December, 1887, received a letter from John G. Holmes, Esq., connected with the Citizens' Passenger Railway Company and also with the Citizens' Traction Company, the original of which is hereto annexed and made part of this petition.

Your petitioner shows unto your honors that the said capital stock is exceedingly valuable, but that — is informed and believes that neglect on his part as administrator to sell the said stock or accept stock in the traction railway company for the same is leading to

an embarrassment of the Citizens' Passenger Railway Company and might possibly result in the depreciation of the said stock.

That your petitioner is uncertain as to whether is would be more advisable to exchange said stock for stock in the traction company or to sell the same at such price as can be obtained for the
250 same to-day, but he is of opinion that one or the other should be done.

He therefore respectfully requests that your honors, after due notice given to the parties in interest, will instruct and authorize him to accept either the stock in the traction company, as specified in the letter hereto attached, or that you will authorize him to sell the said Citizens' Passenger Railway Company stock at public auction.

And he will ever pray, &c.

STATE OF PENNSYLVANIA, } ss:
County of Allegheny, }

Personally before me came A. M. Byers, the above-named petitioner, who, being duly sworn according to law, says that the statements contained in the foregoing petition are correct and true.

A. M. BYERS.

Sworn and subscribed before me this 2nd day of December, 1887.

L. H. MATHEWS,
[L. S.] *Notary Public.*

PITTSBURGH, PENNA., *November 29th*, 1887.

A. M. Byers, Esq.

DEAR SIR: I desire to present to you in a formal way the matter of which we have heretofore talked in reference to the disposition of the stock of the Citizens' Passenger Railway Company, held by you as administrator of Miss McAuley.

The Citizens' Traction Company was organized under the act of assembly of March 22nd, 1887, with power to operate passenger railways by cable or other mechanical motors. It was es-
251 pecially designed to furnish motive power for the Citizens' Passenger Railway and the Transverse road, which had then been leased by the Citizens' Passenger Railway Company.

The act of 1887 does not authorize the building or purchase of railways by traction companies, but does authorize the leasing, operating by motive power, railways owned by passenger railway companies.

In accordance with this power a lease of the Citizens' and Transverse railways, property, and franchises was made to the Citizens' Traction Company, based on the present earning power of those roads, with a contract for operating them.

The act of 1887 further authorizes traction companies to purchase stock of the roads which they may lease. Under this power it was expected that the traction company would eventually become owner of all the stock of those companies.

The stock of the traction company was subscribed for by the stockholders of the Citizens' and Transverse Companies, and the subscribers for the stock of the traction company, among themselves as individuals, had an understanding that they would exchange the stock of the traction company held by them for stock of the Citizens' and Transverse Companies held by other parties on the basis of seven shares of traction stock for one of Citizens' and two and one-third shares of traction for one of Transverse.

In accordance with this understanding, all the stockholders of the Transverse Company and all the stockholders of the Citizens' Company, except yourself, have surrendered their stock and received for it traction stock on the above basis, and all of the Transverse stock and all of the Citizens' stock except yours has been
252 purchased by the traction company.

This arrangement we all regard as very advantageous to the owners of the Citizens' Passenger Railway stock, and the ownership of the stock of the railway companies by the traction company will greatly facilitate the management of the business proposes and save a considerable amount of taxes.

In order to perfect these arrangements I will transfer to you seven shares of traction company stock for each share of Citizens' Passenger Railway stock now held by you.

Hoping that you will see the advantage of this transaction, I request an early reply.

Yours respectfully, JNO. G. HOLMES.

And now, December 10th, 1887, notice having been duly given to all counsel of record, this matter came on to be heard and upon consideration thereof the court (the counsel for different parties consenting) do authorize the administrator to accept the offer contained in within letter and exchange for seven shares of traction Co. one share of Citizens' Passenger Railway Co. and make such exchange for all Citizens' Passenger Railway Co. stock he holds, and after the exchange to hold the traction Co. stock as assets of the estate of Mary McAuley, deceased.

BY THE COURT.

In the Orphans' Court of Allegheny County.

In the Matter of the Estate of MARY MCAULEY, Dec'd. No. 112, of March Term, '87.

253 And now, December 24th, 1887, notice having been duly given to all the counsel of record in this case, this matter came on to be heard and upon consideration thereof the court do authorize the administrator to accept the offer contained in the within letter and to exchange for seven shares of Citizen-' Traction Company stock one share of Citizen-' Passenger Railway Company stock he holds, and after the exchange to hold the Citizens' Traction Company stock as assets of the estate of Mary McAuley, deceased.

PER CURIAM.

In the Orphans' Court of Allegheny County.

In the Matter of the Estate of MARY MCAULEY, Dec'd. No. 112, of March Term, '87.

Take notice that A. M. Byers, administrator, &c., of Mary McAuley, dec'd, has applied to the court for an order authorizing him to exchange certain stock which he now holds, as such administrator, in the Citizens' Passenger Railway Company of the City of Pittsburgh for stock in the Citizens' Traction Co., and that the court have fixed Saturday, December 24th, 1887, for hearing the arguments upon said motion of the same to be given to the attorneys of record in said case.

D. T. WATSON,
Att'y for A. M. Byers, Adm'r, &c.

254 To Knox & Reed, Wm. M. Watson, Lyon & Shoemaker, Thos. Patterson, D. F. Patterson, E. P. & C. W. Jones.

Service of the within notice accepted for the parties of record whom we represent.
Dec. 17, 1887.

KNOX & REED,
Att'ys for H. B. Shields et al.
WM. M. WATSON,
Att'y for Dora McAuley et al.
LYON & SHOEMAKER,
E. P. & C. W. JONES,
Att'ys for R. F. McAuley, Mrs. Shields, and Mrs. Blakeley.
D. F. PATTER-ON,
Att'y for Ebenezer McBurney.
THOS. PATTERSON,
Att'y for Home of the Friendless.

STATE OF PENNSYLVANIA, } ss:
Allegheny County, }

I, Samuel P. Conner, register of wills and *ex officio* clerk of
[L. S.] the orphans' court in and for the said county and State, do hereby certify that the foregoing and annexed pages contain a true copy and correct transcript of the record and proceedings in said stated case, at No. 112, March term, 1887, in the orphans' court of said county, so full and entire as the same remains of record in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court, at Pittsburgh, this 15th
255 day of February, 1889.

SAM'L P. CONNER,
Register and ex Officio Clerk of Orphans' Court.

STATE OF PENNSYLVANIA, } ss :
Allegheny County, }

I, Wm. G. Hawkins, Jr., president judge of the orphans' court in and for the county and State aforesaid, do hereby certify that the above-named Samuel P. Conner, by whom the foregoing attestation was made, was at the time of so making the same and is now *ex officio* the clerk of said court, duly commissioned and qualified, to all whose acts as such full faith and credit are and ought to be given; that the seal thereto annexed is the seal of the said court, and that the said attestation so made by him is in due form of law.

In testimony whereof I have hereunto set my hand and seal, at Pittsburgh, this 15th day of February, 1889.

W. G. HAWKINS, JR., [SEAL.]
President Judge.

ALLEGHENY COUNTY, ss :

[L. S.] I, Samuel P. Conner, register of wills and *ex officio* clerk of the orphans' court in and for said county, do certify that Hon. W. G. Hawkins, Jr., by whom the foregoing certificate was given and whose name is thereto subscribed in his own proper handwriting, was at the date thereof president judge of the said court, duly commissioned, sworn, and acting.

In witness whereof I have hereunto set — hand and affixed the seal of the said court, at Pittsburgh, this fifteenth day of February, 1889.

SAM'L P. CONNER,
Register and ex Officio Clerk of Orphans' Court.

256 In the Circuit Court of the United States for the Western District of Pennsylvania.

HENRY B. SHIELDS *et al.*
vs.
ROBERT F. MCAULEY *et al.* } No. 19. May Term, 1887.

WESTERN DISTRICT OF PENNSYLVANIA :

I, Geo. B. Motheral, duly appointed by the circuit court of the United States for said district in pursuance of agreement of counsel bearing date the 19th day of February, A. D. 1889, and the order of court this day made, do hereby return the foregoing exemplification of record of the orphans' court of Allegheny county, Pennsylvania, showing at length the proceedings at No. 112, March term, 1887.

GEO. B. MOTHERAL,
Special Examiner.

Filed Feb'y 23, 1889.

H. D. GAMBLE, *Clerk.*

257 *Petition as to Investment of Monies in Hands of Administrator.*

In the Circuit Court of the United States for the Western District of Pennsylvania.

HENRY B. SHIELDS *et al.*
vs.
ROBERT F. MCAULEY *et al.* } No. 19. May Term, 1887. In Equity.

To the honorable the judges of the said court:

The petition of Alexander M. Byers, administrator of all and singular the goods and chattels which were of Mary McAuley, late of the county of Allegheny, deceased, respectfully shows—

That he now has in his possession belonging to the estate of the said decedent the sum of one hundred and twenty-two thousand and seventy-six and twenty-one one-hundredths ($126,076.21) dollars in cash.

That, as he is advised, he is not authorized to make any investment of this money; but that as the same is not, nor has it been since the filing of his first account, bearing interest, but held in readiness to pay out in accordance with the order of court, and as appeals have been taken in this case which may delay the final distribution of the estate, he respectfully prays that your honorable court will instruct him in the premises as to what disposition or investment of this money he shall make pending such appeals.

ALEX. M. BYERS,
Administrator of Mary McAuley, Deceased.

258 STATE OF PENNSYLVANIA, } *ss:*
County of Allegheny, }

Personally before me, a notary public within and for said county and State, came the above-named Alexander M. Byers, who, being by me duly sworn according to law, deposes and says that the statements contained in the foregoing petition are correct and true.

ALEX. M. BYERS.

Sworn — and subscribed before me this 25th day of February, 1889.

L. H. MATHEWS,
[L. S.] *Notary Public.*

Filed by leave of court Feb'y 26, 1889.

H. D. GAMBLE, *Clerk.*

Notice.

In the Circuit Court of the United States for the Western District of Pennsylvania.

HENRY B. SHIELDS *et al.*
vs.
ROBERT F. MCAULEY *et al.* } No. 19. May Term, 1887.

To —— ——:

You will please take notice that on Tuesday morning, February 26th, 1889, at 10 o'clock a. m., I shall present the petition of Alexander M. Byers, asking the court for instructions as to investment of monies now in his possession as administrator pending the appeals to the Supreme Court of the United States.

Yours, &c.,

D. T. WATSON,
Attorney for A. M. Byers.

A copy of the within notice served on me this 25th day of February, 1889.

D. F. PATTERSON,
Att'y for Ebenezer McBurney et al.
H. & G. C. BURGWIN,
Att'ys for Home for Aged Protestant Women.
THOS. PATTERSON,
Att'y for the Home for the Friendless.
KNOX & REED,
Att'ys for Plaintiff.
WM. M. WATSON,
Att'y for Dora McAuley et al.
E. P. & C. W. JONES,
Att'ys for R. F. McAuley et al.
LYON & SHOEMAKER.
For Parties for Whom We Appear.

Filed Feb. 26, 1889.

H. D. GAMBLE, *Clerk.*

260 *Notice.*

In the Circuit Court of the United States for the Western District of Pennsylvania.

HENRY B. SHIELDS *et al.*
vs.
ROB'T F. MCAULEY *et al.* } No. 19. May Term, 1887.

You will please take notice that Mr. Patterson and Mr. Jones have notified me that they will ask the court to make an order that the cash in the hands of the administrator be paid over to the present first cousins on their giving refunding bonds for the same. The

court has fixed Friday morning at 10 o'clock for the hearing, and you will please be present.

D. T. WATSON,
Attorney for the Administrator.

P'g'h, Feb'y 29, 1889.

A copy of the within notice served on me this 27th day of February, 1889.

THOS. PATTERSON,
Att'y for the Home for the Friendless.
LYON & SHOEMAKER,
Att'ys for Parties for Whom We Appear.
KNOX & REED,
Att'ys for H. B. Shields.
H. & G. C. BURGWIN,
Att'ys for Home for Aged Protestant Women.
WM. M. WATSON,
Att'y for Dora McAuley et al.

261 *Order on Petition of Adm'r.*

In the Circuit Court of the United States for the Western District of Pennsylvania.

HENRY B. SHIELDS *et al.*
vs.
ROBERT F. MCAULEY *et al.*
No. 19. May Term, 1887. In Equity.

And now, to wit, March 1st, 1889, the motion of the administrator for instruction for the investment of the cash in his hands pending the appeal to the Supreme Court having come on to be heard, it is ordered that said fund to the extent of five thousand dollars be loaned to each one of the thirteen first cousins upon their severally giving a bond, with sureties to be approved by the court, conditioned for the repayment thereof on final disposition of the cause by the Supreme Court of the United States, with interest thereon.

BY THE COURT.

Filed March 1, 1889.

H. D. GAMBLE, *Clerk.*

Appeal of Melissa M. Shields and Henry B. Shields in Right of Said Melissa M. Shields.

In the Circuit Court of the United States for the Western District of Pennsylvania.

HENRY B. SHIELDS *et al.*
vs.
ROBERT F. MCAULEY *et al.*
No. 19. May Term, 1887. In Equity.

262 To the honorable the Supreme Court of the United States:

The appeal of Melissa M. Shields and Henry B. Shields in the right of his wife, Melissa M. Shields, the above-named plaintiff, respectfully showeth—

That on the 28th day of March, 1887, your petitioner, in his own right and in the right of his wife, did file his bill of complaint in the circuit court of the United States for the western district of Pennsylvania at the above number and term, setting forth that Mary McAuley, late of the county of Allegheny, died on the 6th day of January, A. D. 1886, and at the time of her death was a citizen of the State of Pennsylvania.

That said Mary McAuley left no relative but first and second cousins; that on the 12th day of January, 1886, a writing purporting to be the last will and testament of the said Mary McAuley, deceased, was offered for probate in said county of Allegheny by A. M. Byers, one of the defendants in said bill, and was admitted by the register of wills of said county to probate; that letters of administration *cum testamento annexo* upon the estate of said decedent were issued to the said A. M. Byers; that the paper purporting to be the last will and testament of Mary McAuley, deceased, a copy of which was attached to said bill, was not executed within the time required by the act of the General Assembly of the State of Pennsylvania, approved the 26th day of April, 1885; that the bequests of the Home for Friendless and Home for Aged Protestant Women had lapsed and become void; that the said Mary McAuley died seized of a large estate, partly realty and partly personalty;
263 that the said A. M. Byers had not proceeded in accordance with the laws of the State of Pennsylvania in filing a true account; that there were two classes of claimants of the estate of Mary McAuley, deceased, to wit, first and second cousins; that Henry B. Shields was an assignee of James McAuley, a first cousin; that great and difficult questions have arisen in the distribution of the said estate among said claimants; that said bill prayed that the probate of said alleged will be declared void and of no effect; that bequests in said will be declared lapsed; that the said A. M. Byers be enjoined and restrained from selling or disposing of real estate, etc., and that the court direct a decree and partition of such real estate, and that the said A. M. Byers be ordered and directed to make a full and true account of the assets of said estate.

That answers were filed by certain of the defendants respectively and the matter was so proceeded with that a master was appointed, who filed his report November 1st, 1888; that exceptions thereto were filed, and upon the 5th day of January, 1889, the circuit court did upon bill, answers, replications, testimony, and the report of master and exceptions thereto hear the said case and dismissed the said exceptions and confirmed the master's report, and did make the final decree that the real estate that was of Mary McAuley, situate in Duquesne way, in the city of Pittsburgh, be distributed equally between the Home for the Friendless and the Home for the Aged Protestant Women; that the personal estate of said decedent be distributed among the 13 first cousins of said decedent to the exclusion of the second cousins; that the administrator is ordered to transfer the stocks and pay out the cash aforesaid of said
264 decedent's personal estate in accordance with the schedule of distribution reported by said master.

Wherefore these appellants appeal from the whole of said decree of the said circuit court of the United States and herein pray that the decree of the said circuit court and the pleadings, depositions, evidence, and proceedings in the said case may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear said case anew, and that such decree of the said circuit court and every part thereof may be reversed and a decree made as to the said Supreme Court of the United States may seem just.

HENRY B. SHIELDS.
MELISSA M. SHIELDS.

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

Before me, the subscriber, personally came Melissa M. Shields and Henry B. Shields, who, being duly sworn according to law, depose and say that this appeal is not taken for the purpose of delay, but because injustice has been done them by the decree of said circuit court.

MELISSA M. SHIELDS.
HENRY B. SHIELDS.

Sworn and subscribed to before me this 28th day of February, A. D. 1889.

H. D. GAMBLE.

Order of Court.

And now, to wit, March 1, 1889, the within petition of
265 Melissa M. Shields and Henry B. Shields, in the right of his wife, Melissa M. Shields, asking for the allowance of an appeal to the Supreme Court of the United States, being presented, said appeal is allowed, and the bond of said appellant with E. M. Byers and Thomas J. Stevenson as sureties in the sum of $25,000.00 is hereby approved.

BY THE COURT.

Filed March 1, 1889.

H. D. GAMBLE, *Clerk.*

Bond of Melissa M. Shields.

In the Circuit Court of the United States for the Western District of Pennsylvania.

HENRY B. SHIELDS, a Resident and Citizen of Ohio,
vs.
ROBERT F. MCAULEY, a Resident and Citizen of the State of Pennsylvania, *et al.*

Know all men by these presents that we, Henry B. Shields and Melissa M. Shields, of Girard, Ohio; E. M. Byers and Thomas J. Stevenson, of Allegheny county, Pennsylvania, are held and bound

unto Robert F. McAuley, Mary Douglass, Susan Blakeley, Sarah M. Hill, George T. Jackson, L. I. Jones, Caroline Van Wyck, Ida
266 McAuley, Margaret Shearer, Ebenezer McBurney, Julia Ash, Sarah Thompson, Catherine Gault, Eliza Monzingo, Martha Crawford, A. M. Byers, administrator; The Home of the Friendless, The Home for Aged Protestant Women, their executors, administrators, successors, or assigns, in the sum of twenty-five thousand dollars, lawful money of the United States of America; to which payment, well and truly to be made, we do bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this twenty-eighth day of February, A. D. 1889.

Whereas the above-named Melissa M. Shields and Henry B. Shields are about to appeal to the Supreme Court of the United States from the final decree of the circuit court of the United States in the above-entitled action:

Now, therefore, the condition of this obligation is such that if such appeal is taken and the said Henry B. Shields and Melissa M. Shields shall prosecute their appeal to effect, and if they fail to make their plea good shall answer all damages and *cists*, with just damages for delay and costs and interest on the appeal, then this obligation shall be void; otherwise to be and to remain in full force and virtue.

MELISSA M. SHIELDS. [SEAL.]
HENRY B. SHIELDS. [SEAL.]
E. M. BYERS. [SEAL.]
THOS. I. STEVENSON. [SEAL.]

Signed and sealed in presence of—
J. G. BELL.

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

267 E. M. Byers and Thos. I. Stevenson, being duly sworn, say that the sureties on the said bond are each worth the amount thereof over and above their just debts and liabilities and the property exempt by law from levy and sale on execution.

E. M. BYERS.
THOS. I. STEVENSON.

Sworn and subscribed this 1st day of March, A. D. 1889.

H. D. GAMBLE, *Clerk.*

And now, to wit, March 1st, 1889, the within bond approved.

BY THE COURT.

Filed March 1, 1889.

H. D. GAMBLE, *Clerk.*

Petition for Appeal. Affidavit and Order Allowing Appeal.

In the Circuit Court of the United States for the Western District of Pennsylvania, Sitting in Equity. No. 19. May Term, 1887.

To the honorable the judges of the said court:

HENRY B. SHIELDS, resident and citizen of the State of Ohio, assignee of James McAuley, a resident and citizen of the State of Kansas, and Henry B. Shields, in right of Melissa M. Shields,
268 also a resident and citizen of the State of Ohio, being this their bill

against

ROBERT F. MCAULEY, MARY DOUGLASS, SUSAN BLAKELEY, SARAH M. Hill, Robert F. M. Campbell, Mary Parker, Jane Stewart, all citizens of the State of New York; Rev. John McAuley, a citizen of the State of New Jersey and resident therein; Martha Jane McGogney and William B. McGogney, her husband; Margaret P. Hugus and N. H. Hugus, her husband; Catherine Watson, Doctor William Watson, Wilson Stewart Watson, Julia Ash, Ebenezer McBurney, Kate Gault, Sarah Thompson, Martha Crawford, and Ebenezer M. McBurney, all citizens of the State of Pennsylvania, and James M. Watson, a citizen of the State of Pennsylvania; William Parker, a resident and citizen of the State of Iowa; Eliza Paul, Rilla Wilson and Dr. J. M. Wilson, her husband; Dora McAuley and Mary Montgomery, all residents and citizens of the State of Illinois; Eliza A. Egbert and Thomas McAuley, residents and citizens of the State of California; James Campbell, a resident and citizen of the State of Nebraska, and others.

To the honorable the Supreme Court of the United States:

The appeal of Dora McAuley, Rilla Wilson and J. M. Wilson, her husband; Martha J. McGogney and Wm. B. McGogney, her husband; Margaret P. Hugus and N. H. Hugus, her husband; Catharine Watson, Doctor William Watson, James M. Watson, W. Stewart Watson, Elizabeth Carr and J. R. Carr, her husband, respectfully showeth—

That on the 28th day of March, 1887, said Henry B. Shields, in his own right and in right of his wife, did file his bill of complaint in the circuit court of the United States for the western dis-
269 trict of Pennsylvania, at the above number and term, setting forth that Mary McAuley, late of the county of Allegheny, within said district, died on the sixth day of January, A. D. 1886, and at the time of her death was a citizen of the State of Pennsylvania within said district.

That said Mary McAuley left no relatives but first cousins and second cousins; that on the 12th day of January, 1886, a writing purporting to be the last will and testament of the said Mary McAuley, deceased, was offered for probate in said county of Allegheny

by A. M. Byers, one of the defendants in said bill, and was admitted by the register of wills of said county to probate; that letters of administration *cum testamento annexo* upon the estate of said decedent were issued to the said A. M. Byers; that the paper purporting to be the last will and testament of Mary McAuley, deceased, a true copy of which was annexed to said bill, was not executed within the time required by the act of the General Assembly of the State of Pennsylvania, approved the 26th day of April, 1855; that the bequests of the Home for the Friendless and the Home for Aged Protestant Women had lapsed and become void; that the said Mary McAuley died seized of a large estate, partly realty and partly personalty; that the said A. M. Byers had not proceeded in accordance with the laws of Pennsylvania in filing a true account; that there were two classes of claimants claiming the estate of Mary McAuley, deceased, to wit, first cousins and second cousins; that Henry B. Shields was an assignee of James McAuley, a first cousin of said Mary McAuley, deceased; that grave and difficult questions have arisen in the distribution of said decedent's estate among said claimants; that said bill prayed that the pro-
270 bate of said alleged will be declared lapsed and void; that the said A. M. Byers be enjoined and restrained from selling or disposing of real estate, &c., and that the court direct a decree and partition of such real estate, and that the — A. M. Byers be ordered and directed to make a full and true account of the assets of said estate.

That answers were filed by certain of the defendants respectively and the matter was so proceeded with that a master was appointed, who filed his report November 1, 1888; that exceptions were filed thereto, and upon the 5th day of January, 1889, the said circuit court did, upon bill, answer, replication, testimony, and the report of the master and exceptions thereto, dismiss the said exceptions and confirmed the master's report, and did make the final decree that the real estate that was of Mary McAuley, deceased, situate on Duquesne way, in the city of Pittsburgh, be distributed equally between the Home for the Friendless and the Home for Aged Protestant Women; that the personal estate of said decedent — distributed among the thirteen first cousins of said decedent to the exclusion of the second cousins of said decedent; that the administrator is ordered to transfer the stock and pay out the cash aforesaid of said decedent's personal estate in accordance with the schedule of distribution reported by the said master.

Wherefore these appellants, all being second cousins (or husbands thereof of said Mary McAuley, deceased), appeal from the whole of said decree of the said circuit court of the United States, and herein pray that the said decree of the said circuit court and the
271 pleadings, depositions, evidence, and proceedings in said case may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear said case anew, and that the said decree of the said circuit court and every part thereof may be reversed and a decree made as to the aid Supreme Court of the United States may seem just.

It is understood that these appellants do not appeal from the order of the circuit court directing the sale of the real estate on Duquesne way, Pittsburgh, Pennsylvania, and hereby consent to said sale.

DORA McAULEY.
RILLA WILSON.
DR. J. M. WILSON.
MARTHA J. McGOGNEY.
W. B. McGOGNEY.
N. H. HUGUS.
DR. WILLIAM WATSON.
JAS. M. WATSON.
W. STEWART WATSON.
ELIZABETH CARR.
J. R. CARR.
MARGARET P. HUGUS.
CATHARINE WATSON.

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

Before me, the subscriber, personally came William Watson, who, being duly sworn according to law, doth depose and say that this appeal is not taken for the purpose of delay, but because injustice has been done affiant and his co-appel-ants by the decree of the said circuit court.

WM. WATSON.

Sworn and subscribed before me this 13th day of March, A. D. 1889.

H. D. GAMBLE, *Clerk.*

272 *Order of Court.*

And now, to wit, March 13th, 1889, the within petition of Dora McAuley, William Watson, and others, asking for the allowance of an appeal to the Supreme Court of the United States being presented, said appeal is allowed, and the bond of William Watson, with E. M. Byers and Thomas J. Stevenson as sureties, in the sum of twenty-five thousand dollars is hereby approved.

M. W. ACHESON, *Judge.*

Filed March 13, 1889.

H. D. GAMBLE, *Clerk.*

Bond of Appeal.

In the Circuit Court of the United States for the Western District of Pennsylvania.

HENRY B. SHIELDS, a Resident and Citizen of Ohio,
vs.
ROBERT McAULEY, a Citizen and Resident of the State of Pennsylvania, *et al.*

Know all men by these presents that we, William Watson, of Allegheny county, Pennsylvania, and E. M. Byers and Thomas J. Stevenson, of the same place, are held and bound unto Robert
273 McAuley, Mary Douglass, Susan Blakeley, Sarah M. Hill, George T. Jackson, Lostitia Jones, Caroline Van Wyck, Ida

McAuley, Margaret Shearer, Ebenezer McBurney, Julia Ash, Sarah Thompson, Catharine Gault, Eliza Monzingo, Martha Crawford, A. M. Byers, administrator; the Home of the Friendless, the Home for Aged Protestant Women, their executors, administrators, successors, or assigns, in the sum of twenty-five thousand dollars, lawful money of the United States of America; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this thirteenth day of March, A. D. 1889.

Whereas the above-named William Watson and others are about to appeal to the Supreme Court of the United States from the final decree of the circuit court of the United States in the above-entitled proceeding:

Now, therefore, the condition of this obligation is such that if such appeal is taken and the said William Watson and his co-appellants shall prosecute their appeal to effect, and if they fail to make their plea good shall answer all damages and costs, with just damages for delay and costs and interest on the appeal, then this obligation to be void; *to*herwise to be and remain in full force and virtue.

WILLIAM WATSON. [SEAL.]
E. M. BYERS. [SEAL.]
THOS. J. STEVENSON. [SEAL.]

Signed and sealed in the presence of—
J. G. BELL.

UNITED STATES OF AMERICA, }
Western District of Pennsylvania, } *ss:*

274 E. M. Byers and Thomas J. Stevenson, being duly sworn, say that they are the sureties on the above bond, and that each is worth the amount thereof over and above his just debts and liabilities.

E. M. BYERS.
THOS. I. STEVENSON.

Sworn and subscribed this 13th day of March, A. D. 1889.
Coram—

H. D. GAMBLE, *Clerk.*

And now, to wit, March 13th, 1889, the within bond approved.
M. W. ACHESON, *Judge.*

Filed March 13, 1889.

H. D. GAMBLE, *Clerk.*

Suggestion of Death of Margaretta M. Shear, Def't, and Substitution of Sam'l M. Jackson and Henry T. Jackson, Her Executors, as Def'ts.

In the Circuit Court of the United States for the Western District of Pennsylvania.

HENRY B. SHIELDS
vs.
ROBERT F. MCAULEY *et al.* } No. 19. May Term, 1887. In Equity.

And now, to wit, the 19th day of March, A. D. 1889, the death of Margaretta M. Shears suggested on record.

On motion of E. P. Jones, attorney for said estate, the names of Samuel Macauley Jackson and Henry T. Jackson, executors
275 of said decedent, be substituted as respondents in this case.

BY THE COURT.

I have no objection to above order.

D. T. WATSON, *For Adm'r.*

March 19, 1889.

The People of the State of New York to all to whom these presents shall come or whom may concern, send greeting:

Know ye that we, having inspected the records of our surrogate court in and for the county of New York, do find that on the 27th day of February, in the year one thousand eight hundred and eighty-eight, by said court, letters testamentary on the estate of Margaretta M. Shear, late of the city of New York, deceased, were granted and committed unto Samuel Macauley Jackson and George T. Jackson, both of said city, two of the executors named in the last will and testament of said deceased, and that it does not appear by said records that said letters have been revoked.

In testimony whereof we have caused the seal of the surrogate's court to be hereunto affixed.

Witness Rastus S. Ranson, Esq., surrogate of our said
[L. S.] county, at the city of New York, the 28th day of February, in the year of our Lord one thousand eight hundred and eighty-eight.

JAMES F. MCHAUGHLIN,
Clerk of the Surrogate's Court.

Filed March 19, 1889.

H. D. GAMBLE, *Clerk.*

276 In the Circuit Court of the United States for the Western District of Pennsylvania.

H. B. SHIELDS *et ux.*
vs.
ROB'T F. MCAULEY *et al.* } No. 19. May Term, 1887.

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

I, H. D. Gamble, clerk of the circuit court of the United States for the said district, do hereby certify that the annexed and foregoing pages contain a true copy of the record and proceedings in the above-entitled case, so full and entire as the same remains of record and on file in my office.

Seal of the U. S. Circuit Court, W. D. Penna.

In testimony whereof I have hereunto signed my name and affixed the seal of said court, at Pittsburgh, this 9th day of April, A. D. 1889.

H. D. GAMBLE, *Clerk.*

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

I, M. W. Acheson, judge holding the United States circuit court for said district, do hereby certify that H. D. Gamble, above named, was at the time of making the above certificate and is now clerk of the said court, and that the said certificate made by him is in due form of law.

M. W. ACHESON,
U. S. Judge.

Pittsburgh, April 9, 1889.

277 *Citation on Appeal of H. B. Shields.*

UNITED STATES OF AMERICA,
Western District of Pennsylvania, } *sct:*

To Henry B. Shields and Melissa M. Shields, in right of said Melissa M. Shields; Robert F. McAuley, Mary Douglass, Susan Blakely, Sarah M. Hill, Robert F. M. Campbell, Mary Parker, Jane Stewart, Rev. John McAuley, Martha Jane McGogney and William B. McGogney, her husband; Margaret P. Hugus and N. H. Hugus, her husband; Catharine Watson, Dr. William Watson, Wilson Stewart Watson, James M. Watson, Julia Ash, Ebenezer McBurney, Catharine Gault, Sarah Thompson, Martha Crawford, Ebenezer M. McBurney, William Parker, Eliza Paul, Rilla Wilson and Dr. J. M. Wilson, her husband; Mary Montgomery and Dora McAuley, Eliza A. Egbert, Thomas McAuley, James Campbell, Thomas M. Watson, Margaret Ann Payne, Ann McCauslin, Mrs. Eliza M. Monzingo, Alexander M. Byers, administrator *cum testamento annexo* of the estate of Mary McAuley, deceased; "The Home for the Friendless" and "The Home for Aged Protestant Women," Elizabeth Carr and J. R. Carr, her husband, Greeting:

You are hereby cited and admonished to be and appear at a Su-

preme Court of the United States, to be holden at Washington, D. C., on the second Monday of October next, pursuant to an appeal filed in the clerk's office of the United States circuit court, wherein Henry B. Shields is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant, as in the said appeal mentioned, should not be corrected and why
278 speedy justice should not be done to the parties in that behalf.

Witness my hand this 3d day of April, A. D. 1889.

[Seal of the U. S. Circuit Court, W. D. Penna.]

M. W. ACHESON,
Judge U. S. Court.

Attest: H. D. GAMBLE.
Clerk U. S. Circuit Court, West. Dist. Penna.

279 [Endorsed:] Citation on appeal of H. B. Shields.

April 6th, 1889.—Service accepted for Ebenezer McBurney and other def'ts for whom we appear.

D. F. PATTERSON,
J. W. DONNAN, AND
J. M. McBURNEY.

April 6th, 1889.—Service accepted for Dora McAuley and other respondents for whom we appear.

SOL. SCHOYER, JR.
WM. M. WATSON.

April 6th, 1889.—Service accepted for the "Pittsburgh and Allegheny Home for the Friendless."

THOS. PATTERSON.

April 6th, 1889.—Service accepted for the Home for Aged Protestant Women.

H. AND G. C. BURGWIN.

Ap'l 6, 1889.—Service accepted for Rob't F. McAuley, Susan Blakeley, and the ex'rs of Margaret M. Shear, three of the within-named defendants.

E. P. & C. W. JONES.

Ap'l 8, 1889.—Service accepted for Ebenezer M. McBurney.

WM. L. CHALFANT, *Att'y.*

April 8, '89.—Service accepted for A. M. Byers, adm'r.

D. T. WATSON.

April 9, 1889.—Service accepted for those for whom our appearance is entered.

LYON & SHOEMAKER.

280 *Citation on Appeal of A. M. Byers, Adm'r of Estate of Mary McAuley, Deceased.*

UNITED STATES OF AMERICA, } *sct:*
Western District of Pennsylvania, }

To Henry B. Shields and Henry B. Shields and Melissa M. Shields, in right of said Melissa M. Shields; Robert F. McAuley, Mary Douglass, Susan Blakely, Sarah M. Hill, Robert F. M. Campbell, Mary Parker, Jane Stewart, Rev. John McAuley, Martha Jane McGogney and William B. McGogney, her husband; Margaret P. Hugus and N. H. Hugus, her husband; Catharine Watson, Dr. William Watson, Wilson Steward Watson, James M. Watson, Julia Ash, Ebenezer McBurney, Catharine Gault, Sarah Thompson, Martha Crawford, Ebenezer M. McBurney, William Parker, Eliza Paul, Rilla Wilson, and Dr. J. M. Wilson, her husband; Mary Montgomery and Dora McAuley, Eliza A. Egbert, Thomas McAuley, James Campbell, Thomas M. Watson, Margaret Ann Payne, Ann McCauslin, Mrs. Eliza M. Monzingo, Elizabeth Carr, and J. R. Carr, her husband; "The Home for the Friendless" and "The Home for Aged Protestant Women," Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, D. C., on the second Monday of October next, pursuant to an appeal filed in the clerk's office of the United States circuit court, wherein Alexander M. Byers, administrator *cum testamento annexo* of the estate of said Mary McAuley, deceased, is appellant and you are ap-
281 pellees, to show cause, if any there be, why the decree rendered against the said appellant, as in the said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness my hand this 3d day of April, A. D. 1889.

[Seal of the U. S. Circuit Court, W. D. Penna.]

M. W. ACHESON,
Judge U. S. Court.

Attest: H. D. GAMBLE,
Clerk U. S. Circuit Court, West. Dist. Penna.

282 [Endorsed:] Citation on appeal of A. M. Byers, administrator, &c.

April 6th, 1889.—Service accepted for Ebenezer McBurney and other def'ts for whom we appear.

D. F. PATTERSON,
J. W. DONNAN &
J. M. McBURNEY.

April 6th, 1889.—Service accepted for Dora McAuley and other respondents, for whom we appear.

SOL. SCHOYER, JR.
WM. M. WATSON.

April 6th, 1889.—Service accepted for the "Pittsburgh and Allegheny Home for the Friendless."

THOS. PATTERSON.

April 6th, 1889.—Service accepted for the Home for Aged Protestant Women.

H. & G. C. BURGWIN.

Ap'l 6, 1889.—Service accepted for Rob't F. McAuley, Susan Blakeley, and the ex'rs of Margaretta Shear, three of the within defendants.

E. P. & C. W. JONES.

April 8, 1889.—Service accepted for Ebenezer M. McBurney.

WM. L. CHALFANT, *Att'y.*

April 8, 1889.—Service accepted for those for whom our appearance is entered.

LYON & SHOEMAKER.

283 *Citation on Appeal of Henry B. and Melissa M. Shields.*

UNITED STATES OF AMERICA, *Western District of Pennsylvania,* } *sct:*

To H. B. Shields, Robert F. McAuley, Mary Douglass, Susan Blakely, Sarah M. Hill, Robert F. M. Campbell, Mary Parker, Jane Stewart, Rev. John McAuley, Martha Jane McGogney, and William B. McGogney, her husband; Margaret P. Hugus and N. H. Hugus, her husband; Catharine Watson, Dr. William Watson, Wilson Stewart Watson, James M. Watson, Julia Ash, Ebenezer McBurney, Catharine Gualt, Sarah Thompson, Martha Crawford, Ebenezer M. McBurney, William Parker, Eliza Paul, Rilla Wilson, and Dr. J. M. Wilson, her husband; Mary Montgomery and Dora McAuley, Eliza A. Egbert, Thomas McAuley, James Campbell, Thomas M. Watson, Margaret Ann Payne, Ann McCauslin, Mrs. Eliza M. Monzingo, Elizabeth Carr, and J. R. Carr, her husband; "The Home for the Friendless" and "The Home for Aged Protestant Women," and Alexander M. Byers, administrator *cum testamento annexo* of the estate of Mary McBurney, deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, D. C., on the second Monday of October next, pursuant to an appeal filed in the clerk's office of the United States circuit court, wherein Henry B. Shields and Melissa M. Shields, his wife, in right of said Melissa M. Shields, are appellants, and you are appellees, to show cause, if any

there be, why the decree rendered against the said appellants,
284 as in the said appeal mentioned, should not be corrected and
why speedy justice should not be done to the parties in that
behalf.

[Seal of the U. S. Circuit Court, W. D. Penna.]

Witness my hand this 3d day of April, A. D. 1889.

M. W. ACHESON,
Judge U. S. Court.

Attest: H. D. GAMBLE,
Clerk U. S. Circuit Court, West. Dist. Penna.

285 [Endorsed:] Citation on appeal of H. B. Shields & wife.

April 6th, 1889.—Service accepted for Ebenezer McBurney and other def'ts for whom we appear.

D. F. PATTERSON.
J. W. DONNAN, &
J. M. McBURNEY.

April 6th, 1889.—Service accepted for Dora McAuley and other respondents for whom we appear.

SOL. SCHOYER, JR.
WM. M. WATSON.

April 6th, 1889.—Service accepted for the "Pittsburgh and Allegheny Home for the Friendless."

THOS. PATTERSON.

April 6th, 1889.—Service accepted for "The Home for Aged Protestant Women."

H. & G. C. BURGWIN.

April 6th, 1889.—Service accepted for Robert McAuley, Susan Blakely, and the executors of Margarette Shear, three of the within defendants.

E. P. & C. W. JONES.

Ap'l 8, 1889.—Service accepted for Ebenezer M. McBurney.

WM. L. CHALFANT, *Att'y.*

April 9, 1889.—Service accepted for those for whom our appearance is entered.

LYON & SHOEMAKER.

April 8, '89.—Service accepted for A. M. Byers, adm't'r, &c.

D. T. WATSON.

286 *Citation on Appeal of Dora McAuley et al.*

UNITED STATES OF AMERICA, } *sct:*
Western District of Pennsylvania, }

To Henry B. Shields and Henry B. Shields and Melissa M. Shields, in right of said Melissa M. Shields; Robert F. McAuley, Mary Douglass, Susan Blakely, Sarah M. Hill, Robert M. F. Campbell, Mary Parker, Jane Stewart, Rev. John McAuley, Julia Ash, Ebenezer McBurney, Catharine Gault, Sarah Thompson, Martha Crawford, Ebenezer M. McBurney, Wm. Parker, Eliza Paul, Mary Montgomery, Eliza A. Egbert, Thomas M. McAuley, James Campbell, Thomas M. Watson, Margaret Ann Payne, Ann McCauslin, Mrs. Eliza M. Monzingo, "The Home of the Friendless," and the "Home for Protestant Destitute Women," Alex'r M. Byers, adm'r *c. t. a.*, &c., Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, D. C., on the second Monday of October next, pursuant to an appeal filed in the clerk's office of the United States circuit court, wherein Dora McAuley, Rilla Wilson, and J. M. Wilson, her husband; Martha J. McGogney and William B. McGogney, her husband; Margaret P. Hugus and A. Hugus, her husband; Catharine Watson, Dr. William Watson, James M. Watson, W. Stewart Watson, Elizabeth Carr, and J. R. Carr, her husband, are appellants and you are appellees, to show cause, if any there be, why the decree rendered against the said appellants, as in the said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

287 Witness my hand this 3d day of April, A. D. 1889.

[Seal of the U. S. Circuit Court, W. D. Penna.]

M. W. ACHESON,
Judge of U. S. Court.

Attest: H. D. GAMBLE,
Clerk U. S. Circuit Court, West. Dist. Penna.

288 [Endorsed:] Citation on appeal of Dora McAuley *et al.*

April 6th, 1889.—Service accepted for Ebenezer McBurney and other def'ts for whom we appear.

D. F. PATTERSON,
J. W. DONNAN, &
J. M. McBURNEY.

April 6th, 1889.—Service accepted for the "Pittsburgh and Allegheny Home for the Friendless."

THOS. PATTERSON.

April 6th, 1889.—Service accepted for "The Home for Aged Protestant Women."

H. AND G. C. BURGWIN.

April 6th, 1889.—Service accepted for Robert F. McAuley, Susan Blakely, and the executors of Margaretta M. Shear, three of the within-named defendants.

E. P. & C. W. JONES.

Ap'l 8, 1889.—Service accepted for Ebenezer M. McBurney.

WM. L. CHALFANT, *Att'y.*

April 9, 1889.—Service accepted for those for whom our appearance is entered.

LYON & SHOEMAKER.

April 8th, 1889.—Service accepted for A. M. Byers, admi't'r, &c.

D. T. WATSON.

Endorsed on cover: Case No. 13,698. W. Pennsylvania C. C. U. S. No. 124. Alexander M. Byers, administrator *cum testamento annexo* of Mary McAuley, dec'd, appellant, *vs.* Robert F. McAuley *et al.* Filed October 5, 1889. Case No. 13,703. No. 128. Henry B. Shields, appellant, *vs.* Robert F. McAuley *et al.* Case No. 13,704. No. 129. Henry B. Shields and Melissa M. Shields, his wife, in right of said Melissa M. Shields, appellants, *vs.* Robert F. McAuley *et al.* Case No. 13,705. No. 130. Dora McAuley, Rilla Wilson, *et al.*, appellants, *vs.* Robert F. McAuley *et al.* Filed October 7, 1889.

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Office Supreme Court U. S.
FILED.
DEC 15 1892
JAMES H. McKENNEY,
CLERK.

RECORD CASE No. 19,698.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

TERM No. 124.

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

ALEXANDER M. BYERS, Administrator c. t. a. of Mary McAuley, Deceased, Appellant,

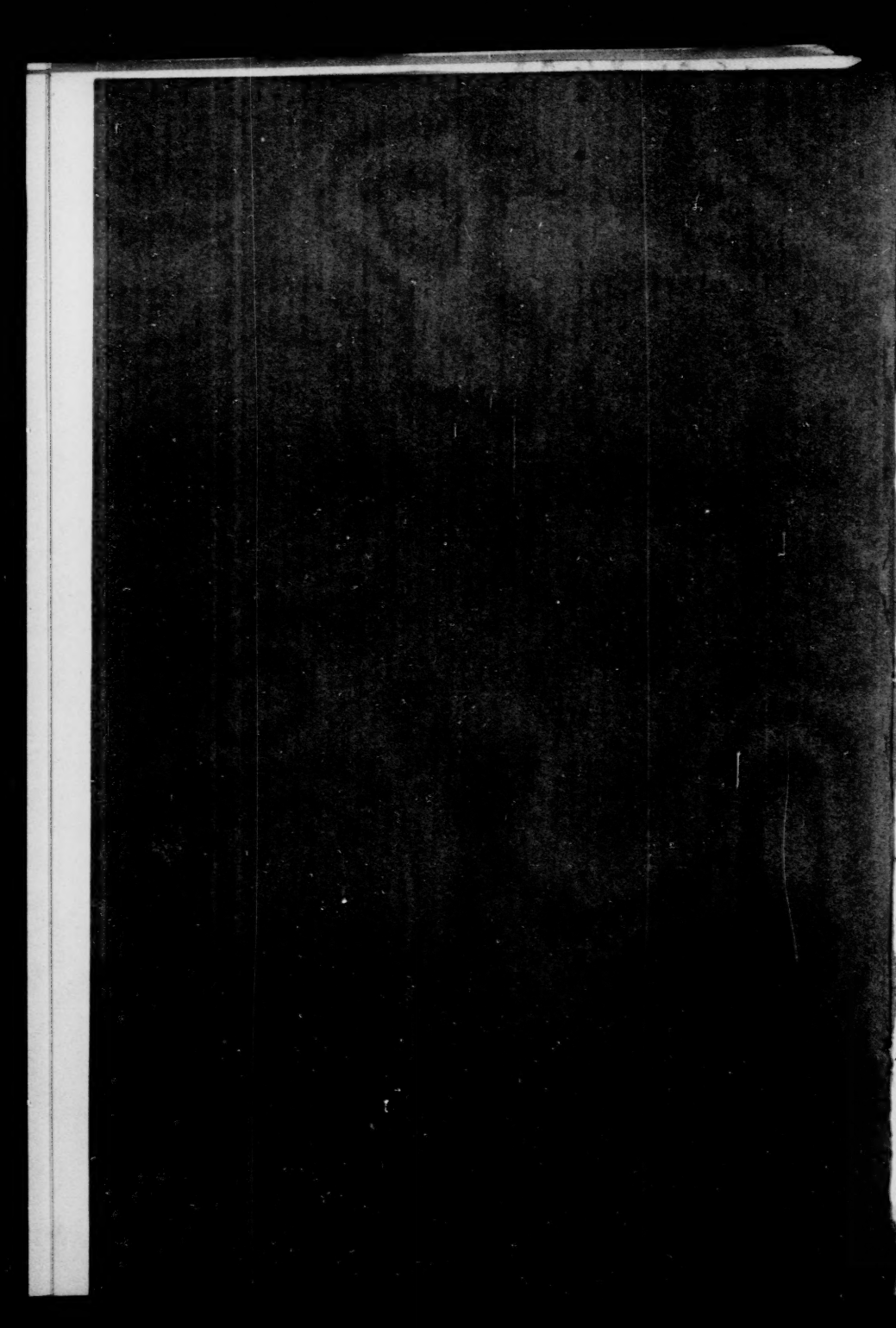
VERSUS

ROBERT F. McAULEY et al., Appellees.

PAPER BOOK OF APPELLANT.

D. T. WATSON,
Attorney for Appellant.

E. F. ANDERSON CO., LTD., PRINTERS, PITTSBURGH



IN THE

Supreme Court of the United States.

RECORD CASE NO. 13,698.

OCTOBER TERM, 1892.

TERM No. 124.

ALEXANDER M. BYERS, Administrator, *cum testamento annexo* of MARY MCAULEY, deceased, Appellant,

Against

HENRY B. SHIELDS, a resident and citizen of the State of Ohio, assignee of JAMES MCAULEY, a resident and citizen of the State of Kansas; and HENRY B. SHIELDS, in right of his wife, MELISSA M. SHIELDS, also a resident and citizen of the State of Ohio, ROBERT F. MCAULEY, MARY DOUGLASS, SUSAN BLAKELY, SARAH M. HILL, ROBERT F. M. CAMPBELL, MARY PARKER, JANE STEWART, all citizens of the State of New York; REV. JOHN MCAULEY, a citizen of the State of New Jersey and resident therein; MARTHA JANE MCGOGNEY and WILLIAM B. MCGOGNEY, her husband; MARGARET P. HUGUS and N. H. HUGUS, her husband; CAROLINE WATSON, DR. WILLIAM WATSON, WILSON STEWART WATSON, JAMES M. WATSON, JULIA ASH, EBENEZER MCBURNEY, KATE GAULT, SARAH THOMPSON, MARTHA CRAWFORD, EBENEZER MCBURNEY, all citizens and residents of the State of Pennsylvania; WILLIAM PARKER, a citizen and resident of the State of Iowa; ELIZA PAUL, RILLA WILSON and DR. J. M. WILSON, her husband; MARY MONTGOMERY and DORA MCAULEY, all residents and citizens of the State of Illinois; ELIZA A. EGBERT and THOMAS

McAULEY, residents and citizens of the State of California; JAMES CAMPBELL, a resident and citizen of the State of Nebraska; THOMAS M. WATSON, a resident and citizen of the State of Alabama; MARGARET ANN PAYNE, a resident and citizen of the State of Minnesota; ANN McCAUSLIN, whose residence is unknown; none of whom are residents and citizens of the State of Ohio; MRS. ELIZA M. ZANNINGO, a resident and citizen of the State of Iowa; heirs-at-law of MARY McAULEY, late of the city of Pittsburgh, in the State of Pennsylvania, deceased, THE HOME OF THE FRIENDLESS and the HOME FOR PROTESTANT WOMEN, both corporations of the State of Pennsylvania.

STATEMENT.

[References are to the printed record.]

There is but a single question raised by the administration in this case, and that is,

> Had the Circuit Court of the United States for the Western District of Pennsylvania, on March 28th, 1887, jurisdiction to entertain a Bill in Equity for and to actually administer and distribute the personal property in the hands of Alexander M. Byers, administrator *cum testamento annexo* of the last will and testament of Mary McAuley, deceased?

The facts are these:

> Miss Mary McAuley, a citizen of Pennsylvania, residing in Allegheny County, of that State, died on the 6th day of January, A. D. 1886. Her will was probated on January 12th, 1886, before the Register of Wills of said County of Allegheny, and letters of

administration *cum testamento annexo* on the same day were granted to Alexander M. Byers, the appellant.

The will was in these words:

> "By the request of my dear brother my house on Duquesne way is to be sold at my death, and the proceeds to be divided between the Home of the Friendless and the Home for Protestant Destitute Women." (Signed,)
>
> MARY MCAULEY.

It bore no date and was not witnessed.

Mr. Byers proceeded with the administration of the estate, and on January 29th, 1887, he filed before the said Register of Wills an account showing what sums of money and property he had received, what monies he had paid out, and what balance he had in his hands for distribution. A copy of this account will be seen at page 14 of the printed record. It shows a balance in his hands for distribution, as per schedule annexed, to the amount of $212,235.61.

The Register of Wills, by the Pennsylvania statute of March 15th, 1832, was given jurisdiction of

> "The probate of wills and testaments, of the granting of letters testamentary and of administration, of the passing and filing of accounts of executors, administrators and guardians." (*P. L.* 136.)

Under Section 29 (*P. L.* 143), the Register was required

> "Before he shall allow the accounts of any executor or administrator he shall carefully examine the same and require the production of the necessary vouchers or other satisfactory evidence of the several items contained in it."

Section 30 (*P. L.* 143) further provides that:

> "Every Register, having allowed and filed any account in his office, shall prepare and present a certified copy thereof to the Orphans Court of the respective county, at its next stated meeting, being not less than thirty days distant from the time of such filing and allowance, of all which he shall give notice to all persons concerned in the following manner, viz: By an advertisement enumerating all the accounts to be presented at any one time to the said court in at least two newspapers (if there be two) published in the respective county, (*b*) or if there be but one newspaper published in such county, then in that one, or if there be none, then in one printed nearest to the said county, at least once a week during the four weeks immediately preceding the meeting of the court at which such account shall be presented, setting forth, in substance, that the accountants (naming them and the character in which they respectively act) have settled their accounts in the office of the said Register, and that the same will be presented to the Orphans Court for confirmation, at a certain time and place (mentioning the same); and also by setting up conspicuously in his office, and in at least six other of the most public places in the county, (*a*) at least four weeks before the time appointed for the presentation of such accounts as aforesaid, fairly written or printed copies of such advertisement; and the actual expense of such advertisement, according to the usual rates of advertising in such newspapers, and the setting up of such notices, shall be divided among all the accounts presented at the same court, and the proper portion thereof only shall be charged in any of the said accounts, and allowed to the Register as the cost of such advirtisement and notices.
>
> "No account of an executor, administrator or guardian shall be confirmed and allowed by the Or-

phans Court, except in the cases herein specially provided for, unless it shall appear on the presentation of such account that notice of such presentation has been given, conformably to the directions of the Act entitled 'an Act relating to Registers and Registers Courts.'

* * * * * * *

"All accounts presented to the Orphans Courts by executors, administrators, guardians or trustees, (*e*) except partial accounts rendered by guardians in pursuance of section the 10th of this Act, shall, unless it be otherwise agreed by all parties interested, be examined by the court or referred to suitable persons, not exceeding three in number, to be appointed by the said court, or by the parties where they are all present or duly represented, and competent to agree; and the persons so appointed shall be sworn or affirmed to perform their duties with fidelity, and shall have power to administer oaths and affirmations to parties (*g*) and witnesses in all cases referred to them."

1 *Purdon's Digest*, pages 549, 550.

The Orphans Court of Allegheny county, under the Act of May 19th, 1874, (*P. L.* 207), was directed to audit accounts without the appointment of an auditor.

This account of A. M. Byers as administrator *c. t. a.*, filed before the Register on January 29th, 1887, the Register examined and allowed, and thereupon he gave notice by advertisement as required by law that the said account would, on March 7th, 1887, be presented to the Orphans Court of Allegheny county for examination and approval.

In accordance with this notice the account was presented to the Orphans Court, on March 7th, 1887, and was by that court approved and confirmed *nisi*.

Rule 21 of the Orphans Court is as follows:

> "Accounts allowed by the Register shall be presented on the first day of each term and confirmed *nisi* if they appear on examination to be correct, and the Register has given the required notice; which confirmation shall become absolute without further order unles exceptions are filed within ten (10) days."

No exceptions were filed to this account, and, therefore, on March 18th, 1887, the confirmation became absolute.

The Orphans Court has this further rule:

> "A list of accounts to be audited by the court will be taken up on the third Mondays of March, June, September and December, respectively; notice thereof having previously been given, and, so far as practicable, ten accounts audited, consecutively, each day (Saturdays and Sundays excepted), until the whole list shall have been disposed of. Such list shall be prepared by the clerk and embrace all accounts: (1) included in the last Register's list showing balance for distribution; (2) to which exceptions have been filed, and (3) such other accounts as may be specially ordered down for audit.
>
> "Accountants, creditors and other persons interested, will be expected to attend at the time fixed for audit and furnish such information and produce such evidence as may be necessary to make a proper disposition of exceptions and of funds for distribution. In cases where the proceeds of sales of real estate are to be distributed, accountants will be required to furnish lists of liens, properly certified, the cost whereof will be paid out of the fund for distribution."

In accordance with this rule this confirmed account of A. M. Byers, administrator, showing a large balance for distri-

bution, on March 21st, 1887, was placed upon the audit list of the court for hearing and distribution of the balance found in the administrator's hands, and the court fixed March 29th, 1887, as the day to hear the case.

The different statutes of Pennsylvania regulating distribution are as follows:

The Act of February 24th, 1834, *P. L.* 40, *et seq.*, gives to the administrator or executor one year for the settling of the estate, but provides that whenever distribution shall be required by any person the administrator shall present to the Orphans Court a statement of all demands against the estate, and of what the assets of the estate consist of, and after deducting the amount of demand the court shall distribute the balance, and this distribution may be renewed at the end of six months, and again renewed until the estate is disposed of.

No person can receive any portion of the estate to be distributed as a distributee or a legatee unless he shall give sufficient real or personal security, to be approved of by the Orphans Court, in such sum and form as the court shall dictate, with the condition that if any debt or demand shall afterwards be recovered against the estate of the decedent, or otherwise be due and made to appear, he will refund the ratable part of such debt or demand and of the costs and charges attending the recovery of the same; or in case the person is unable to give such security the court may direct that the money or property be put at interest, and the income thereof paid to the legatee or distributee.

Administrators making a distribution in accordance with these rules are not liable if subsequent debts arise, but if they distribute it regardless of these rules they are liable should subsequent debts arise.

On March 28th, 1887, the day before the hearing thus fixed, a bill in equity was filed in the Circuit Court of the United States, for the Western District of Pennsylvania, against the administrator and other parties interested in the estate. It recited the fact of Miss McAuley's death, the probate of her will, which it alleged to be void, and asserting interests in the property in the administrator's hands, the bill prayed for the following relief:

> 1-2-3-4. To decree the probate of the will to be void and the bequest therein lapsed and the will void, and the administrator be restrained from selling the real estate, and decree for partition of real estate.
>
> (5th.) "That the said A. M. Byers be ordered and directed to make a full, just and true account of all stock, money and other assets of said estate that may have come into his hands, and that an account be taken of said testator's debts and funeral expenses, and that the surplus of said estate, after paying all the debts and expenses of said estate, be distributed to and among your orators and such other persons as may be found to be legally entitled thereto, and that until such final decree of your honors in this case for such distribution the said A. M. Byers be enjoined and restrained from paying out or distributing to any person any money or valuable thing belonging to said estate or in any manner disposing thereof."
>
> (7th.) For further relief.

To speedily test the question of jurisdiction the administrator filed in the Circuit Court a plea on May 10th, 1887, which will be found on pages 12, 13 and 14 of the printed record, and of the material portions of which this is a copy:

"That heretofore, to-wit, on the 29th day of January, 1887, this respondent, as administrator of all and singular the goods and chattels which were of Mary McAuley, late of the county of Allegheny, in the State of Pennsylvania, deceased, as in and by the statutes of the said state in such case made and provided he was bound to do, filed his account of all and singular the said goods before the Register in and for the said county of Allegheny, State of Pennsylvania, who had jurisdiction of the same, and then and there, as provided by the statute, gave notice to all persons in interest by advertisement that the said Register would present the said account on the 7th day of March, 1887, to the Orphans Court of Allegheny county for examination and approval, the said court under the statutes of the State of Pennsylvania having exclusive jurisdiction thereof.

"That the said account afterwards, to-wit, on the 7th day of March, 1887, was presented to the said Orphans Court of the said county of Allegheny, and was by said court confirmed and approved *nisi*, and under the practice of the said court the said confirmation *nisi* became absolute unless exceptions thereto were filed within ten days' time from the confirmation of the said account *nisi*, to-wit, on or before the 18th day of March, 1887.

"That no exceptions were filed to the said account, and on the 18th day of March, 1887, the confirmation thereof became absolute; that the said account showed upon its face the entire personal property of the decedent and all sums of money received by this administrator from the same, and also showed the entire expenditure of this respondent as administrator as aforesaid, leaving a balance in the hands of respondent as administrator for distribution, amounting to a large sum, to-wit, the sum of two hundred and twelve thousand two hundred and thirty-five and sixty-one one-hundredths ($212,235.61) dollars, the

same being partly in cash and partly in personal property of the said decedent.

"That afterwards, to-wit, on the 21st day of March, 1887, the said account thus confirmed and approved was placed upon the audit list of the said court for the purpose of hearing and distributing the balance shown by the said account to be in the hands of this respondent, as administrator, to and among such persons as are entitled thereto, and a day for the hearing thereof was fixed by the said court, to-wit, on the 29th day of March, 1887, and that the Orphans Court, under the laws of the State of Pennsylvania, had exclusive jurisdiction of the said hearing and distribution.

"That said Orphans' Court had thus acquired jurisdiction of the accounts of your respondent, and of the estate of the said Mary McAuley, deceased, and of the distribution of the balance shown to be in your respondent's hands as administrator, and of the various matters and things involved in said account, a true copy of which account is hereto annexed, and made part of this plea, and that the said jurisdiction was thus acquired prior to the filing of the bill of complaint in this court by the said complainants.

"That the said Orphans Court, by virtue of its jurisdiction as aforesaid, is proceeding to distribute the property of the said decedent in the hands of this respondent as administrator, as aforesaid, to and among such persons as shall be entitled thereto.

"Wherefore this respondent does plead the said matters and things to the jurisdiction of this court, and prays the judgment of this court whether he ought to make any further or other answer to the said bill of complaint."

This plea was filed under an agreement subsequently reduced to writing, and of which this is a copy:

> And now, May 17th, 1887, with the leave of court, the parties hereto agree that the plea in this case, filed on the 10th day of May, 1887, shall be set down for a hearing and argument on the merits of the same.
>
> "If the subject matter set forth in the plea is a bar to the jurisdiction of the Circuit Court in the distribution of the balance shown by the account of the said administration, which is annexed to and made part of the said plea, that then the said plea should be sustained, and that it shall not be overruled, because it is not a plea to the whole of said bill, nor to the jurisdiction of the said Circuit Court as to other matters and things alleged in the said bill of complaint in this case filed."

The plea was at once set down for a hearing, and, after argument, and on May 18th, 1887, it was overruled, and the administrator ordered to answer over. The court below did not file an opinion.

On June 29th, 1887, the administrator filed an answer in which he again set up the facts hereinbefore recited, and averred that thereby the Orphans Court of Allegheny county had first acquired jurisdiction, and that, therefore, the Circuit Court cannot administer and distribute the assets in his hands.

(See page 21 to 23.)

December 1st, 1887, a replication was filed (page 34), and an examiner appointed (page 38).

The testimony taken before him is reported on page 40 to page 71. The proofs showed, besides other things, that the facts were as stated in the plea.

The court, on May 29th, 1888, made an interlocutory decree for an account, of which this is a copy:

> "And now, to wit, May 29th, 1888, this cause came on to be heard on bill, answer, and testimony, and, upon consideration thereof, it is ordered, adjudged and decreed that an account of the personal estate be stated by Alexander M. Byers, administrator of Mary McAuley, deceased, before Cicero Hasbrouck, Esq., who is hereby appointed master in this case, and that after notice to parties and time given for filing of exceptions to this account the said master is directed to take testimony as to the parties interested in the distribution of the balance in the hands of said administrator and to report said testimony, with schedule of distribution, to the said court."

The administrator stated before the master an account as directed by this decree, and the master further took testimony as to who were the distributees.

The master made a report including a schedule of distributees (pages 75 to 87).

On January 5th, 1889, a final decree was made by the Circuit Court, of which this is a copy:

> "And now, to wit, January 5th, 1889, this cause came on to be heard on bill, answers, replication, testimony, and the report of the master with exceptions thereto, and was argued by counsel; whereupon, upon consideration thereof by the court, it is ordered, adjudged and decreed that the proceeds of the sale of the real estate that was of Mary McAuley, deceased, situate on Duquesne way, in the city of Pittsburgh, after deducting expenses attending the same, shall be distributed equally between the 'Home for the Friendless' and the 'Home for Aged Protestant Women.'

> "And it is further ordered, adjudged and decreed that the exceptions to the master's report be overruled and the said report confirmed, and that the personal estate of said decedent be distributed among the thirteen first cousins of said decedent to the exclusion of her second cousins in conformity with said master's report, and that unless an appeal be duly entered from this decree within sixty days from this date the administrator is ordered to transfer the stocks and pay out the cash of said decedent's personal estate in accordance with the schedule of distribution reported by the said master, adding the sum of nine dollars and sixty-one cents ($9.61) to the cash share of each of said thirteen distributees to cover the duplicate credit of one hundred and twenty-five dollars ($125) for examiner's fees inadvertently allowed in said master's report."

The result was that though the Orphans Court assumed jurisdiction; had decreed that the account of the administrator, as presented to it, was correct; had ascertained the balance for distribution, and fixed a day to hear the parties who claimed to be entitled to it; yet after all this was done the Circuit Court, on an original bill filed in that court, actually took the case out of and away from the Orphans Court, ordered its administrator to state an account, and proceeded with and distributed the assets in the hands of the administrator.

It completely and most effectively ousted the jurisdiction of the Orphans Court.

ASSIGNMENTS OF ERROR.

(1.) The Circuit Court erred in overruling the plea of the appellant, which plea and the order and decree of the court thereon are as follows:

> "That heretofore, to-wit., on the 29th day of January, 1887, this respondent, as administrator of all and singular the goods and chattels which were of Mary McAuley, late of the county of Allegheny, in the State of Pennsylvania, deceased, as in and by the statutes of the said State in such case made and provided he was bound to do, filed his account of all and singular the said goods before the Register in and for the said county of Allegheny, State of Pennsylvania, who had jurisdiction of the same, and thereupon the said Register passed upon said account, and then and there, as provided by the statute, gave notice to all persons in interest by advertisement that the said Register would present the said account on the 7th day of March, 1887, to the Orphans Court of Allegheny county for examination and approval, the said court under the statutes of the State of Pennsylvania having exclusive jurisdiction thereof.
>
> "That the said account afterwards, to-wit., on the 7th day of March, 1887, was presented to the said Orphans Court of the said county of Allegheny, and was by said court confirmed and approved *nisi*, and under the practice of the said court the said confirmation *nisi* became absolute unless exceptions thereto were filed within ten days' time from the confirmation of the said account *nisi*, to-wit, on or before the 18th day of March, 1887,
>
> "That no exceptions were filed to the said account, and on the 18th day of March, 1887, the confirma-

tion thereof became absolute; that the said account showed upan its face the entire personal property of the decedent and all sums of money received by this administrator from the same, and also showed the entire expenditure of this respondent as administrator as aforesaid, leaving a balance in the hands of respondent as administrator for distribution amounting to a large sum, to-wit., the sum of two hundred and twelve thousand, two hundred and thirty-five and sixty-one one-hundredths ($212,235.61) dollars, the same being partly in cash and partly in personal property of the said decedent.

"That afterwards, to-wit., on the 21st day of March, 1887, the said account thus confirmed and approved was placed upon the audit list of the said court for the purpose of hearing and distributing the balance shown by the said account to be in the hands of this respondent, as administrator, to and among such persons as are entitled thereto, and a day for the hearing thereof was fixed by the said court, to-wit., on the 29th day of March, 1887, and that the Orphans Court, under the laws of the State of Pennsylvania, had exclusive jurisdiction of the said hearing and distribution.

"That said Orphans Court had thus acquired jurisdiction of the accounts of your respondent, and of the estate of the said Mary McAuley, deceased, and of the distribution of the balance shown to be in your respondent's hands as administrator, and of the various matters and things involved in said account, a true copy of which account is hereto annexed and made part of this plea, and that the said jurisdiction was thus acquired prior to the filing of the bill of complaint in this court by the said complainants.

"That the said Orphans Court, by virtue of its jurisdiction as aforesaid, is proceeding to distribute the property of the said decedent in the hands of this

respondent as administrator as aforesaid, to and among such persons as shall be entitled thereto.

"Wherefore this respondent does plead the said matters and things to the jurisdiction of this court, and prays the judgment of this court whether he ought to make any further or other answer to the said bill of complaint.

ORDER AND DECREE OF THE COURT.

Plea over-ruled.

(II). The Circuit Court erred in not holding and decreeing that the Orphans Court of the county of Allegheny, in the State of Pennsylvania, had, prior to the 28th day of March, 1887, obtained and then actually had jurisdiction over the administration of said decedent, and of his account and the assets in his hands, and the administration and distribution of the property, real and personal, of Mary McAuley, deceased, and that this jurisdiction excluded the interference of the Circuit Court as to the same matters and things, and that, therefore, the Circuit Court did not have jurisdiction to entertain the bill in equity, filed March 28th, 1887.

(III). The Circuit Court erred in making the following decree:

"And now, to-wit, January 5th, 1889, this cause came on to be heard on bill, answers, replication, testimony, and the report of the master with exceptions thereto, and was argued by counsel; whereupon, upon consideration thereof by the court, it is ordered, adjudged and decreed that the proceeds of the sale of the real estate that was of Mary McAuley, deceased, situate on Duquesne way, in the city of Pittsburgh, after deducting expenses attending the same, shall be distributed equally between the

'Home for the Friendless' and the 'Home for Aged Protestant Women.'

"And it is further ordered, adjudged and decreed that the exceptions to the master's report be overruled and the said report confirmed, and that the personal estate of said decedent to the exclusion of her second cousins in conformity with said master's report, and that unless an appeal be duly entered from this decree within sixty days from this date, the administrator is ordered to transfer the stocks and pay out the cash of said decedent's personal estate in accordance with the schedule of distribution reported by the said master, adding the sum of nine dollars and sixty-one cents ($9.61) to the cash share of each of said thirteen distributees to cover the duplicate credit of one hundred and twenty-five dollars ($125) for examiner's fees inadvertently allowed in said master's report.

(IV.) The court erred in not entering a decree dismissing the plaintiff's bill.

(V.) The court erred in not holding and decreeing that it had not jurisdiction to decree and make distribution of the balance in the hands of the administrator, but should have decreed that the Orphans Court had acquired jurisdiction for such purpose, and the same was exclusive of and prevented the Circuit Court from obtaining jurisdiction for the same purpose.

POINTS OF LAW.

(1.) Prior to March 28th, 1887, and on that day the Orphans Court of Allegheny County, Pennsylvania, had acquired and then had jurisdiction of the administrator of the estate of Mary McAuley, deceased, and of his accounts and of the assets in his hands, and of the distribution of the same to and among the persons entitled thereto.

The Register of Wills in Pennsylvania has the granting of letters testamentary and of administration, and the passing upon in the first place of the accounts of executors and administrators.

See Act of March 15th, 1832 (*P. L.* 135).
2 *Purdon's Digest*—Title, Register.

After letters of administration are granted on the estate of a decedent by the Register it is the duty of the administrator, after the lapse of one year, to file his account before the Register, showing the condition of the estate, which includes all the property which has come into his hands—all paid out —and what the balance is.

This the Register passes upon, and by the 29th Section of the Act of 1832 (*P. L.* 143), it is provided that:

> "Every Register, before he shall allow the accounts of any executor or administrator, shall carefully examine the same and require the production of the necessary vouchers or other satisfactory evidence of the several items contained in it."

When the account is filed before the Register, and he has examined it and passed it, he then advertises once a week for four weeks preceding the session of court that the account has been settled before him, and on a day certain he will present the same for confirmation to the Orphans Court.

On the day certain the account is so presented, and the Orphans Court, according to the rules in Allegheny county, confirms it *nisi*, and unless exceptions thereto are filed within ten (10) days the same becomes absolute.

When it becomes absolutely confirmed by the court, if it shows a balance in the hands of the admistrator, it goes down on the audit list, and an early day is appointed for distribution.

The distribution is regulated by the Act of February 24th, 1832, (*P. L.* 80,) the material portions of which are as follows:

> "No administrator shall be compelled to make distribution of the goods of an intestate until one year be fully expired from the granting of the administration of the estate.
>
> "Whenever distribution as aforesaid shall be required by any person interested, the administrator shall present to the Orphans Court having jurisdiction of his accounts a statement of all demands against the estate which have been made known to him, and after deducting the amount thereof from the assets in his hands, together with such further sum as may be necessary to pay the interest aud cost of suit of such as may be in dispute, and of such as he may deem it to be his duty to dispute, make distribution of the residue under the direction the Orphans Court aforesaid.
>
> "After six months elapsed from a distribution made as aforesaid, the like proceedings, in all respects, may be had for distribution of further assets,

if any shall then remain, after deducting, as aforesaid, for other demands which may have been known to the administrator, and so, from time to time, until the whole estate shall be settled and distributed.

"Before any person shall be entitled to receive any share in the distribution, as aforesaid, he shall give sufficient real or personal security, to be approved of by the Orphans Court having jurisdiction, as aforesaid, in such sum and form as the said court shall direct, with condition, that if any debt or demand shall afterwards be recovered against the estate of the decedent, or otherwise be duly made to appear, he will refund the ratable part of such debt or demand, and of the costs and charges attending the recovery of the same; but if the person or persons entitled to receive the same is or are unable to give the security aforesaid, then the money shall be put at interest, on security approved by the Orphans Court, on application shall order it to be paid to the person or persons entitled to it.

"Executors, after one year elapsed from the granting of the administration of the estate, upon the requisition of any legatee, or any other person interested, shall pay and deliver, under the direction of the Orphans Court having jurisdiction of their accounts, all such legacies as are due and payable by them, or a proportionate part thereof, first deducting all demands against the estate, and such further sums as may be necessary to pay the interest and costs of such as are disputable or in dispute; and if there shall be a residue, distributable under the intestate laws of this commonwealth, they shall also distribute the same; and the proceedings in any such case shall, in all respects, whether of security or otherwise, be the same as are hereinbefore provided in the cases of distribution by administrators of the estates of decedents intestate, so far as the nature of the case will permit.

> "Executors or administrators making distribution, or paying or delivering any legacies as aforesaid, shall not be liable for the assets so paid or distributed in respect to any claim or demand upon the decedent not previously made known to them, where security shall be taken, as is hereinbefore provided.
>
> "Executors and administrators may make distribution, and pay or deliver legacies, without application, as aforesaid, to the Orphans Court, upon such security as may be satisfactory to them, nevertheless at their own risk."

The constitution of Pennsylvania in Article V. provides that the judicial power of the commonwealth shall be vested in the Orphans Court and other courts. While the Orphans Court was always a Court of Record in Pennsylvania and had been in existence for many years prior thereto it had been composed of the Judges of the Common Pleas, and not until 1874 was it made a separate Court of Record in the counties of Allegheny and Philadelphia, and had separate judges.

See Act of May 19th, 1874, *P. L.*, 206, and supplements, and generally see 2 *Purdon's Digest*, page 1278—Title, Orphans Court.

The jurisdiction of the Orphans Court had been established by the Act of June 16th, 1836, (*P. L.*, 792). Among other things the Act enacted that

> "The jurisdiction of the several Orphans Courts shall extend to and embrace :
>
> I. The appointment, control, removal and discharge of the guardians of minors and the settlement of their accounts.
>
> II. The removal and discharge of executors and administrators deriving their authority from the Register of the respective county, and the settlement of their accounts.

III. The distribution of the assets and surplusage of the estates of decedents after such settlement, among creditors and others interested.

IV. The sale of real estates of decedents.

V. The partition of the real estates of intestates among the heirs.

VI. The specific execution of contracts made by decedents to sell and convey any real estate of which such decedent shall *die seised.*

VII. Proceedings for the recovery of legacies.

VIII. All cases within their respective counties, wherein executors, administrators, guardians or trustees may be possessed of, or are in any way accountable for any real or personal estate of a decedent.

And such jurisdiction shall be exercised under the limitations, and in the manner provided by law.

The jurisdiction here vested in the Orphans Court, it will be noticed, includes the *settlement of the accounts* of administrators and executors and the *distribution of the assets* and *surplusage of the estates of decedents.*

It has been repeatedly held that this jurisdiction is exclusive, and to the Orphans Court alone in Pennsylvania is committed the care, management and distribution of the estates of decedents.

Whiteside vs. Whiteside, 20 *Pa. St.*, 473.
Hughes' Appeal, 57 *Pa. St.*, 179.
Holliday vs. Ward, 19 *Pa. St.*, 485.
Kittera's Estate, 17 *Pa. St.*, 416.

The statement of facts show that the administrator filed his account with the Register on January 29th, 1887. The Register passed the account, and then advertised that on

March 7th, 1887, he would present it to the Orphans Court for approval.

On March 7th, 1887, he did present it to the Orphans Court for approval, and the court did approve it *nisi*, and under a rule of court this approval became absolute in ten (10) days if no exception were filed thereto.

On March 18th, 1887, it became absolute, no exceptions having been filed.

The account showed a large balance for distribution, and in accordance with the rule of court on March 21st, 1887, this account showing this balance was put on a list of causes, and March 29th, 1887, fixed as the day for the actual distribution by the court of the balance.

The jurisdiction of the Orphans Court in Pennsylvania, as we have seen, expressly includes the settlement of the accounts of executors and administrators and the distribution of the assets and surplusage of the estates of decedents among creditors and distributees.

When the Orphans Court, on March 18th, 1887, confirmed the account of the administrator, this definitely and finally settled the fact to be that the administrator had properly and legally collected the assets and paid the debts of the decedent up to January 29th, 1887, the day upon which the account was filed in the office of the Register of Wills.

Yet on a bill filed March 28th, 1887, praying *inter aliae* for a full, just and true account of all stock, money and other assets that have come into the administrator's hands, including the testator's debts and funeral expenses, and that the surplus of said estate, after paying all the debts and expenses of satd estate, be distributed, the Circuit Court of the United States took jurisdiction of the account of the administrator, and May 29th, 1888, decreed that

> "An account of the personal estate be stated by Alexander M. Byers, administrator of Mary McAuley, deceased, before Cicero Hasbrouck, Esq., who is hereby appointed master * * * * and to report said testimony with schedule of distribution to the said Court."

If the Circuit Court had the jurisdiction to make this decree it could allow or *disallow* any items contained in the account of the administrator, all of which items the Orphans Court had allowed.

When the Orphans Court, on March 7th, 1887, had presented to it the account of the administrator, showing a balance in his hands for distribution of $212,235.61, it acquired jurisdiction of this balance. It had the power to determine whether or not this was the correct balance, and this balance it had the power to distribute. These are among the express grants of power to the court, and in Pennsylvania it is the only court having such power.

When, on March 18th, 1887, it confirmed the administrator's account and found that $212,235.61 was the correct balance, and ordered the account upon the audit list, and fixed March 29th, 1887, as the day for the hearing upon and distribution of this balance, it had thereby taken jurisdiction of this balance and of its distribution just as certainly as if it had decreed an actual distribution.

As this court said in Williams vs. Benedict, 8 *Howard*, 112:

> "The jurisdiction of that (Orphans) court has attached to the assets; they are in *graemio legis*."

(II.) Assuming that the Circuit Court of the United States had under certain circumstances a concurrent jurisdiction with the Orphans Court of Allegheny county, Pennsylvania, of the settlement of the accounts of the administrator of Mary McAuley, deceased, and the distribution of the assets in his hands, yet in whichever court a suit is first brought, thereby that court acquires jurisdiction to hear and determine the cause, and this is exclusive of the jurisdiction of the other courts, and as in this case the suit was first brought in the Orphans Court, that court had exclusive jurisdiction to distribute the balance in the hands of the administrator.

Through the Register of Wills, and in the mode prescribed by statute, the administrator of Mary McAuley gave notice by advertisement to every one interested in her estate, that on March 7th, 1887, he would begin a "suit" in the Orphans Court of Allegheny county by presenting to said court his account; by submitting the said account for examination and approval, and the balance in his hands for distribution by the court.

Such account was presented on March 7th, 1887. In effect it was a prayer or demand for the court to approve the account and distribute the balance in his hands.

In one aspect it was a proceeding *in rem.* The property was in the hands of the officer of the law who held it as trustee, and the Orphans Court has jurisdiction both over the officers and assets.

> "The estate of decedent is a trust fund in the hands of the administrator or executor, placed there for the benefit of the creditors and distributees. In the contemplation of law it is in the custody of the Probate Court, in *græmio legis.*"
>
> Yarly vs. Lavender, 21 *Wallace*, 280.

In another aspect it is a personal suit, in which the administrator is the petitioner or plaintiff, and all persons interested in the estate as creditors or distributees or legatees are the defendants.

In either aspect it was a "suit."

> Kohl vs. *U. S.*, 91, 375.
>
> Gaines vs. Fuentes, 92 *U. S.*, 10.
>
> Searles vs. School District, 124 *U. S.*, 197.
>
> Broadhead vs. Shoemaker, 44 *Fed. Reptr.*, 516.

As it was a suit the Orphans Court of Allegheny county, on March 7th, 1887, acquired jurisdiction of the settlement of the account of the administrator of Mary McAuley, deceased, and the distribution of the balance of assets in his hands, and hence this jurisdiction was exclusive of the Circuit Court. That court could not, on March 28th, 1887, entertain a bill to settle said account and distribute said balance.

> "There is no principle better settled than that where two or more tribunals have a concurrent jurisdiction over the same subject-matter and the parties a suit commenced in any one of them may be pleaded in abatement to an action for the same course in any other."
>
> Shelly vs. Bacon, 10 *Howard*, 56.

In Senior vs. Pierce, 31 *Fed. Rep'r*, page 527, the law is thus stated:

"We owe it, beyond doubt, to the wisdom of the Supreme Court of the United States in planting deeply in our legal system the principle that where a court of either jurisdiction has, by legal process, custody of persons or property, the courts of the other jurisdiction shall not attempt to wrest such persons or property from the court first obtaining possession of the same. Again and again has this principle been laid down by the Supreme Court, as will be seen by the authorities cited below. That court has put its decision upon the ground that the possession of the officer of a court under legal process is the possession of the court, and that an attempt to wrest persons or property from the custody of the officer is an invasion of the jurisdiction of the court. See Buck vs. Colbath, 3 *Wal.*, 334, 341; Hagan vs. Lucas, 10 *Pet.*, 400; Taylor vs. Carryl, 20 *How.*, 583; Freeman vs. Howe, 24 *How.*, 450; Ableman vs. Booth, 21 *How.*, 506; *Ex parte* Dorr, 3 *How.*, 104; Peck vs. Jenness, 7 *How.*, 624; Slocum vs. Mayberry, 2 *Wheat.*, 1; Covell vs. Heyman, 111 *U. S.*, 176; 4 *Sup. Ct. Rep.*, 355. Nothing in the way of illustration or argument could be added to what is enforced in these cases. Particular attention may, however, be called to Peck vs. Jenness, in which the doctrine is fully stated, and where the court, among other things, say:

"Neither can one court take property from the custody of the other, by replevin or any other process; for this would produce a conflict extremely embarrassing to the administration of justice."

In Kohn vs. Ryan, 31 *Fed. Reptr.*, 638, it is further said:

"The general rule that one court will not seek to take possession of property already within the possession or control of a court of concurrent jurisdiction is too well settled to need discussion. If a State court, through a receiver or administrator appointed

by such court, or by levy of a writ issued to the sheriff or other executive officer of the court, has taken possession of property, the United States court will not interfere with such possession."

The contention we make in this case is not in conflict with Payne vs. Hook, 7 *Wallace*, 429, and that class of cases, including Shelby vs. Bacon, *supra*, and is in direct line with Yarly vs. Lavender, 21 *Wallace*, 278, and Williams vs. Benedict, 8 *Howard*, 107.

Whenever as in this case the actual jurisdiction by a suit commenced has been vested in the Orphans Court, this turned its concurrent jurisdiction into an exclusive one, and neither the Circuit Court of the United States or any other court without appellate jurisdiction could interfere with or oust its proceeding, and take from it the case it was hearing and the assets it had for distribution.

The principle we contend for in this case is, we submit, ruled by the case of the Leadville Coal Co. vs. McCreery, 141 *U. S.*, 475.

There the United States Court had first acquired jurisdiction and proceeded to determine the conflicting rights, and a subsequent attempt to institute proceedings in a state court as to the same subject matter was held by this court to be "an anomaly in legal proceedings."

Yet in the case at bar, notwithstanding the Orphans Court of Allegheny county had finally decreed that the account of the administrator as to the estate of the decedent was correct, the Circuit Court with knowledge of this fact made a decree that the administrator should account before a master appointed by that court.

In our case the Orphans Court in an orderly manner was proceeding to adjudicate upon the rights of the parties in and to the assets of Mary McAuley, and having settled the ques-

tion of whether the administrator had properly collected the assets and paid the expenses and debts, it fixed a day to determine the rights of the parties to the assets and placed the case on the audit list.

The day before the hearing the present bill in equity was filed, asking in effect the Circuit Court of the United States to disregard the proceedings in the Orphans Court and the decree it had made and the order fixing the day for distribution, and notwithstanding these, to take charge of the entire matter; remove it away from the Orphans Court and itself distribute the assets.

All this the Circuit Court did. It ousted entirely the jurisdiction of the Orphans Court, took from it the assets which it had under its control, and directed the suitor to obey its orders and decrees.

(III.) The objection to the jurisdiction of the Circuit Court was properly raised:

(I). By a plea to the jurisdiction with an accompanying agreement narrowing the subject for discussion in the court below merely to one question: The jurisdiction of the Circuit Court of the United States under the bill filed March 28th, 1887, to distribute the balance in the hands of the administrator, as shown by the account filed in the Orphans Court.

(II.) By answer after the plea was overruled, which answer raised the entire subject of jurisdiction.

The information which some mode of pleading was to convey to the Circuit Court of the United States was that the Orphans Court of Allegheny county had actual jurisdiction, and, in legal effect, actual possession of all the assets of Mary McAuley in the hands of her administrator. This conveyed, in some proper way the court below should have avoided a conflict it raised between the Federal and State courts, and have dismissed the plaintiff's bill, or, at least, restricted its scope so as not to include the distribution of the assets. The question was not alone, or even chiefly, one for protection of the administrator from possible conflicting decisions to each of which the respective courts might hold him and use its processes to compel obedience; but it involved a question for the court itself of graver moment than the inconvenience or possible harm to the administrator, and that was, after this knowledge imparted to it whether the Circuit Court would or could, consistently with the decisions of this court and the admitted rules governing the conduct of courts of concurrent jurisdiction towards each other, insist on proceeding in a case and distributing a fund which was in the possession and control of another court?

If courts of concurrent jurisdiction are astute in enlarging the scope of their own jurisdiction, the amicable relations of the State and Federal courts could not long subsist. Jealousies and strife, always unseemly, but never so much so as between conflicting courts, would disgrace the courts and weaken their influence.

How should this information be given to the courts?

Well, in a case like the present, it could not be given by a technical plea in abatement.

Lord Thurlow is reported as saying (*Beame's Pl. in Equity*, 57–60), that he did not know what a plea in abatement in equity was; and Judge Story, in his work on *Equity Pleading* (secs. 705–715), so far as the question we are now discussing, does not recognize such a plea.

The plea in abatement must always give the plaintiff a better writ or bill (1 *Chitty's Pldg.*, 481, 482), while the effect of the plea in the case at bar was to totally defeat the suit because of the then exclusive jurisdiction of the Orphans Court.

To sustain a plea in abatement of the pendency of a prior action the parties to it must be the same, and the plaintiff the same in each case.

Blackburn vs. Watson, 4 *Norris*, 241.
Thomas vs. Freelon, 17 *Vermont*, 138.
Cornelius vs. Vanarsdallen, 3 *Barr*, 434.

Yet formally there were no parties to the proceedings in the Orphans Court, and yet, in fact, all the creditors and all persons claiming an interest in the estate were parties.

The facts might be brought before the court in almost any orderly way which would give to the court the desired information, and it was unnecessary to put them in the shape of a plea.

Judge Story, in his work on *Equity Pleading*, treats of pleas to the jurisdiction, (sections 710-716), and in accordance with this the plea to be found on pages 11 and 12 of the printed record, gave the court the information of the proceedings in the Orphans Court and formally raised the question.

The parties anxious to narrow the issue and have the jurisdiction depend on one question alone agreed, (page 21 of

printed record), that if the subject-matter set forth in the plea barred the jurisdiction of the Circuit Court in the distribution of the balance in the administrator's hands, as shown by the account, then the plea should be sustained.

The plea was argued and overruled, but why is not stated.

Thereupon the administrator was compelled to answer, and in his answer he set up the same matters, as to the jurisdiction of the Orphans Court, which he had set up in his plea; but the court, nevertheless, decreed an account and ordered him to state one before the master, and subsequently distributed on final decree the assets in his hands, which was the balance shown by the account he had originally filed in the Orphans Court.

Under rule 39 in equity a defendant may insist in his answer upon all defenses he could set up by plea, and under the views hereinbefore urged it would be strange if he could not by his answer set up the proceedings in the Orphans Court.

This is not in contravention of the decisions in Livingston vs. Story, 11 *Peters*, 377, or in that of Wickliffe vs. Owings, 17 *Howard*, 357, which related to personal citizenship of the plaintiff, but is in line with Hawes vs. Oakland, 104 *U. S.*, 451, and the duty of the Federal Courts under the Act of 1875 and its supplements to remand causes not properly removed to the State Courts, and with Peck vs. Jenners, 7 *Howard*, 618, and that class of cases.

D. T. WATSON.

Record Case No. 13,7[illegible]

149 U.S. 608

IN THE

Supreme Court of the United States

OCTOBER TERM, 1893.

TERM No. 1[illegible]

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

DORA McAULEY et al., Appellants,

versus

ROBERT F. McAULEY et al.

PAPER BOOK OF APPELLANTS.

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D. T. Watson.

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Record Case No. 13,705.

149 U.S. 608

IN THE

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OCTOBER TERM, 1892.

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Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

DORA McAULEY et al., Appellants,

VERSUS

ROBERT F. McAULEY et al.

PAPER BOOK OF APPELLANTS.

S. SCHOYER, Jr.
WALTER LYON,
W. M. WATSON.

E. F. ANDERSON CO., LTD., PRINTERS, PITTSBURGH

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OCTOBER TERM, 1892.

TERM No. 130.

DORA MCAULEY ET AL., Appellants,

vs.

ROBERT F. MCAULEY ET AL.

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

HISTORY OF THE CASE.

Mary McAuley, a resident of Pennsylvania, died intestate, as to her personal estate, in the year 1886.

This personal estate was claimed by first cousins and first cousins once removed. The court below awarded the entire estate to the first cousins, to the exclusion of the first cousins once removed, and the latter therefore have appealed to this court from the decree of the court below.

ASSIGNMENTS OF ERROR.

1. The court below erred in ordering, adjudging and decreeing that the personal estate of the decedent be distributed among the thirteen first cousins in conformity with the master's report.

2. The court below erred in not ordering, adjudging and decreeing that the personal estate of the decedent be distributed among the first cousins and cousins further removed of the decedent *per capita.*

ARGUMENT.

The learned judge of the court below (Acheson) based his decisions, excluding from distribution all others than first cousins, on Brenneman's Appeal, 40 *Pa. St. Reports*, p. 115.

That case has since been followed by the Supreme Court of Pennsylvania in Roger's Appeal, 131 *Pa. St. Reports*, p. 382.

Both of these cases, however, were based on the construction of an Act of the Legislature of Pennsylvania, passed in 1855, relating to first cousins. Appellants contend that the Act of 1855 was repealed by a later statute, passed in 1885, prior to the death of Mary McAuley, and that therefore the decisions referred to do not have application to the law bearing on the rights of appellants, and that their rights are to be ascertained under the general statute of 1833.

To support this contention appellants submit the following considerations:

Repeal of the Act of 1855.

The general statute regulating the distribution of estates of intestates in Pennsylvania, was passed in the year 1833, and is published in *Purdon's Digest*, vol. one, page 806, tit., Intestates. By its provisions estates were to be enjoyed *inter alia* as follows, viz:

1. By the lineal heirs of the decedent.

2. In default thereof, by collateral heirs, defined by the statute to be brothers and sisters of intestate, and their children; and in default of brothers and sisters and children, then to the "next of kin," being descendants of brothers and sisters.

3. In default of all persons in said Act before described, then the real and personal estate of the intestate is to descend to and be distributed among the "next of kin" to such intestate. This class, therefore, is composed of uncles and aunts and cousins more or less removed. (See sec. 7, pl. 24.)

4. By section 8 of the Act (pl. 25), no representation among collaterals was admitted after brothers' and sisters' children.

Every other class of distributees took *per capita* when entitled to take.

The 14th section of the Act of 1833 (pl. 33) is in the following words:

"Whenever, by the provisions of this Act, it is directed that real or personal estate shall descend to or be distributed among several persons, whether lineal or collateral heirs or kindred, *standing in the same degree of consanguinity* to the intestate, if there shall be only one of such degree he shall take the whole of such estate, and if there be more than one they shall take in equal shares * *."

This section applied only where the takers as provided for stand *in equal degree* of consanguinity, viz: If all happened to be first cousins, then share and share alike; but if such takers consisted of one only, then he should take the whole estate. It by no means divested the rights of others who also were entitled to take under the Act of 1833. Thus, if the "next of kin" class consisted of both first and second cousins, then the 14th section of the Act of 1833 did not apply, because all the takers were not in equal degree of consanguinity to the intestate. They all took *per capita*, representation being cut off with brothers' and sisters' children by section 8 (*P. L.*, 25).

Thus the law stood until the passage of an Act, approved April 27, 1855, (*P. L.*, 26, *Pamphlet Laws*, 308) which reads as follows, viz:

"Among collaterals, when by existing laws entitled to inherit, the real and personal estate shall descend and be distributed among the grandchildren of brothers and sisters, and the children of uncles and aunts by *representation*; such descendants taking equally among them such share as the parent would have taken if living."

(It is this Act with which Brenneman's Appeal and Roger's Appeal deals, as affecting cousins in remoter degree than first cousins.)

The Act of 1855 repealed by necessity the 14th section of the Act of 1883, above cited, to the extent to which it applied to first cousins; thenceforth when first cousins were entitled to inherit, they did so by the Act of 1855, by *representation*, and not in equal shares as provided for by the 14th section of the Act of 1833.

The Act of 1855 was abrogated by the Act of the Legislature of Pennsylvania, approved June 30, 1885, *Pamphlet Laws*, p. 251, entitled "An Act providing for the manner in which estates of intestates shall be distributed where the distributees stand in the same degree of consanguanity." This statute reinstates the 14th section of the Act of 1883, *verbatim*, and repeals all Acts inconsistent therewith. It is in words as follows, viz:

SEC. 1. * * "That whenever by the provisions of the intestate laws of this commonwealth, it is directed that real and personal estates shall descend to or be distributed among several persons, whether lineal or collateral heirs or kindred standing in the same degree of consanguinity to the intestate, if there should be only one of such degree he shall take the whole of such estate, and if there be more than one they shall take in equal shares * * * * *."

SEC. 2. "All Acts or parts of Acts inconsistent herewith, be and the same are hereby repealed."

It is, therefore, quite apparent that so far as the Act of 1855 dealt with first cousins, in derogation of the 14th section of the Act of 1833, it ceased so to deal when the Act of 1885 became law, and henceforth their rights were to be ascertained

under the provisions of an Act identical with the 14th section of the Act of 1833.

Under the 14th section, when *all* the next of kin were first cousins, they took equally. By the Act of 1855 first cousins when entitled to take took by representation. By the Act of 1885 first cousins can no longer take by representation, and when they are the sole takers they take in equal shares.

As the modification of the 14th section made by the Act of 1855 of the Act of 1833, permitted first cousins to take by representation, instead of *per capita*, the Act of 1885, in restoring the *per capita* rule to first cousins, necessarily repealed the Act of 1855 to that extent. Therefore, whatever rights first cousins and appellants have are determinable by the Act of 1833 with the 14th section restored; and Brenneman's Appeal and Roger's Estate, dealing only with the effect of the Act of 1855, are not applicable to the case at bar, Miss McAuley having died at a date subsequent to the passage of the repealing Act of 1885.

Who Constitute "Next of Kin."

Neither of the cited cases control this case; there is no decision in Pennsylvania which defines the phrase "next of kin" as used in our statute of 1833. It is not, in any event, a phrase of Pennsylvania origin or invention, but has been known in laws of intestacy ever since the time of Charles II.

Such a phrase stands very much in the same position as well known commercial phrases adopted into local statutes, in respect of which this court has held that state adjudications as to their meaning, force and effect, is not binding on this court, as state adjudications are permitted to be on statutes purely local.

It follows, therefore, that did such decisions exist as to the phrase "next of kin," they are to be regarded with respect only, and not as conclusive in this court.

Swift vs. Lyons, 16 *Peters*, 495.
Pease vs. Park, 18 *Howard*, 595.
Fairfield vs. Co. of Gallatin, 100 *U. S.*, 47.
Bergen vs. Seligman, 107 *U. S.*, 20.

And in this connection it will be observed that this appeal does not deal with real estate, fixed and immovable, as affected by the Pennsylvania statutes, but with personal estate, over which Pennsylvania law acquires jurisdiction only by reason of the accident of the residence of the intestate within her borders at the time of her death. Had she at the time of her death been a resident of New York this fund would have been distributed under the laws of the latter state. Who then constitute "next of kin" under section 7 of the Act of 1833, is an open question for this court.

Appellants contend that the phrase means all of the blood relations of intestates, not specifically enumerated and preferred in the superior classes of lineals and collaterals.

No person in any circumstances, outside of the preferred classes of lineals or collaterals, can take under the law of 1833, except as next of kin; and inasmuch as that phrase is sufficiently broad to cover the remotest, *when* they take, it necessarily includes within its meaning *all* who are within degrees of consanguinity. The phrase as used is without any limitation or exception. The Act having taken specific care of all its preferred heirs "lumps" all others into one class, who take next after the last preferred class, and before escheat. Section eight expressly forbids "next of kin" to take by representation under any superior right. It limits representation to brothers' and sisters' children. Hence those who take as next of kin take in their own right as direct heirs of the intestate, by gift of the statute, *per capita*, and not because they are the children of any having in life a better right.

Now, lineal heirs spring from the loins of the decedent; collaterals descend from the father of the decedent; each are accurately placed and defined under the statute of 1833; "next of kin" are traced through the grand-parents of the decedent. Neither grand-father nor uncles and aunts have any inheritance under the statute, except as "next of kin"; it therefore follows that neither grand-parents nor uncles and aunts have any rights which first cousins *could* represent; the latter stand with rights as clearly defined as their parents or grand-parents by the statute itself.

There are no words of exclusion or limitation used in the 7th section of the Act of 1833. If it had been the intent to prefer the *nearest* next of kin, the language afforded the verbiage for such an idea. The old Pennsylvania statute of 1794 expressly limited the right of inheritance in next of kin to those *in equal degree*. (*Smith's Laws*, vol. 3, p. 145, etc., sec. 19.)

The meaning of this phrase is very fully discussed, and the authorities fully reviewed, in the case of Slosson vs. Lynch, 28 *Howard's Practice*, p. 417, and in an article in the *Law Magazine*, a quarterly review of jurisprudence, vol. 14 (Aug. 1835), 121 to 140.

Any other interpretation works a positive injustice; why should this law be interpreted to exclude the helpless children of a first cousin dead in favor of a first cousin living, and thus increase the burden which death has imposed upon them? To what policy of the law can this hard discrimination be ascribed, and of what advantage to the public is it, that those who most require aid by reason of the intervention of providence should be further disabled by giving the portions their fathers if living would have received, to add to the portion which the living brothers and sisters of that father are entitled to receive.

The decision in Brenneman's Appeal has never been received with favor, even as a construction of the Act of 1855. That Act in its terms applied to those who by the Act of 1833 were entitled to take. It *gave* no estate; it took away no estate granted by the Act of 1833; it only purported to designate how certain distributees *should* take, when they were entitled to take at all. Thus, children of uncles and aunts were not entitled by the Act of 1855 to take anything; but *when* they were entitled to take under the Act of 1833 they were no longer to take *per capita*, but by representation. What warrant is there in that Act to take from second cousins, or cousins once removed, that which they would otherwise take under the Act of 1833.

Brenneman's Appeal does not meet this difficulty, but seeks to avoid it by treating first cousins as "promoted" to the superior class of "collateral heirs" along with brothers and sisters, their children and the next of kin descendants of brothers and sisters. But such "promotion" promotes cousins over uncles and aunts, who are still left by the Act of 1855 in the class of "next of kin," under section 7, and are not designated or provided for in the class of "collaterals." And Brenneman's Appeal having promoted "first cousins" into the class of collaterals, fails to say where their place is in the class of "collaterals." If they are to follow the degrees of consanguinity, they being fourth from the propositus, they come in with nephews and nieces, who are also fourth in degree from the propositus, and cut out without enacting words, the "next of kin" class being descendants of brothers and sisters who by the Act of 1833 are preferred to first cousins.

Surely it is much simpler, more equitable, more just, to have construed the Act of 1855 to mean that first cousins, when they took as next of kin, should take representatively, and the others of that class, further removed, should take *per capita*.

Brenneman's Appeal is professedly based on Lane's Appeal, 4 *Casey*, 487. But that case dealt only with nephews and a grand-nephew and a grand-niece. By the Act of 1833, the grandchildren could take only as next of kin of the collateral class, being descendants of brothers' and sisters' children. The Act of 1855 was *remedial* as to them; it took away nothing which the Act of 1833 gave them, but promoted them one degree higher. Lane's Appeal does not seem to warrant the construction that the statute should be construed to *take away* from any distributee that which the Act of 1833 gave to such distributee, as Brenneman's Appeal does with respect of cousins one removed.

Under the laws of Pennsylvania all estates are closed by due publication in accordance with law.

Prestley's Appeal, 127 *Pa. St. Report*, 420.

All members of the "next of kin" class are barred by the decree.

S. SCHOVER, JR.,
WALTER LYON,
W. M. WATSON.

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RECORD CASE No. 13,705.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

TERM No. 130.

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

DORA McAULEY et al., Appellants,

VERSUS

ROBERT F. McAULEY et al., Appellees.

PAPER BOOK OF CERTAIN APPELLEES.

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ARGUMENT.

The final decree of the Circuit Court, printed at page 117 of the record, orders, *inter alia*, "that the personal estate of said decedent be distributed among the thirteen first cousins of said decedent to the exclusion of her second cousins in conformity with said master's report" It is this portion of the decree that the appellants in this case, who are second cousins, allege to be erroneous. We represent first cousins, who are interested in sustaining the decree.

At page 78, the master, who is a lawyer of ability and of great and long experience in the administration of the laws of Pennsylvania relating to the estates of decedents, gives a very clear and concise statement of his opinion. He says:

"Under the Pennsylvania Act of 8th April, 1833, relating to intestates, first cousins take as next of kin of the decedent, and consequently to the exclusion of second cousins. And

nnder that Act they took *per capita* and not *per stirpes*. If any other authority than the Act itself on this point were needed it may be found in Brenneman's Appeal, 40 *Pa. St. R.*, 115, and Hayes' Appeal, 89 *Pa. St. R.*, 256.

"Then came the Act of 27th April, 1855, which enacts that 'among collaterals, when by existing laws entitled to inherit, the real and personal estate shall descend and be distributed among the grandchildren of brothers and sisters and the *children of uncles and aunts by representation*, such descendants taking equally among them such share as their parent would have taken if living.'

"This Act did not extend to nor include second cousins (grandchildren of uncles and aunts) so as to enable them to inherit along with first cousins. It only changed the law as to children of uncles and aunts (first cousins) by enabling them to inherit *per stirpes*, instead of *per capita*, as before. (Brenneman's Appeal, *supra.*)

"Then again came the Act of 30th June, 1885, which enacted that 'whenever real and personal estate shall descend to or be distributed among several persons, whether lineal or collateral heirs or kindred, standing in the same degree of consanguinity to the intestate, if there shall be only one of such degree he shall take the whole of such estate; and if there be more than one they shall take in equal shares, and, if real estate, shall hold the same as tenants in common.' This Act repealed all former Acts or parts of Acts inconsistent therewith.

"The effect of this was to restore the provisions of the Act of 1833 as to those standing in the same degree, so that first cousins would take *per capita*, and not *per stirpes*, as under the Act of 1855."

In considering the purpose of the Act of 1885, it should be kept in mind that the general scheme of distribution among collaterals standing in the same degree of consanguinity to the intestate, as provided by the intestate laws of Pennsylvania, is based upon the *per capita* rule. Thus brothers and sisters, nephews and nieces, descendants of brothers and sisters in a more remote degree than grand-nephews and nieces, uncles and aunts, and kindred in a more remote degree than the children of uncles and aunts, all take *per capita* when they stand in the same degree of consanguinity to the intestate. The only exception to the *per capita* rule, prior to the

Act of 1885, were grandchildren of brothers and sisters and children of uncles and aunts, and these two exceptions were created by the Act of 1885. It would seem plain, therefore, that the purpose of the Act of 1855 was to abolish these two exceptions to the general scheme of distribution and restore the uniformity of the *per capita* rule that had been varied by the Act of 1855, with respect to these two classes.

That such was the understanding of the purpose of the Act of 1885 appears at pages 186-7 of Mr. Jackson's Commentaries on the Laws of Pennsylvania relating to the descent of real and personal property, published early in 1885, where the author, referring to the rule stated in Brenneman's Appeal, says:

"There is now before the Legislature of Pennsylvania the following bill, which will modify the provisions of the 2d Section of the Act of 27th April, 1855, to the extent that when one dies intestate, leaving as his heirs grand nephews or first cousins (who would, under existing laws, each class thereof, inherit among them the share the parent of such class would have taken had such parent been alive at the time of the death of the intestate), the same shall take the inheritance amongst them *per capita*, as is at present the law in regard to grandchildren or nephews."

Following these comments the author prints the then pending bill, which is the identical Act of June 30th, 1885. The purpose of this legislation is made further apparent by reference to Hayes' Appeal, 89 *P. S.*, 256, decided in 1879, and which manifestly led to the passage of the Act of 1885, which is in terms the same as the 14th section of the Act of 1833. In Hayes' Appeal all parties claiming as distributees were first cousins, being children of five deceased uncles and aunts, two of whom left three children each, one left two, and two left one child each. As all stood in the same degree of consanguinity to the intestate, it was argued that the 14th section of the Act of 1833 applied, and that the distribution should be made *per capita;* and it is plain from the opinion of the

auditing judge that the Orphans Court of Philadelphia would have adopted that rule had it not been constrained by Brenneman's Appeal, 40 *P. S.*, 115, to apply the *per stirpes* rule. However, the Supreme Court, in a unanimous opinion delivered by Chief Justice Sharswood, reaffirmed Brenneman's Appeal, and says it could not have been decided otherwise without the court assuming "to change the language of the Act of 1855, in order to make the whole system uniform and harmonious." It is held that the Act of 1855 "constituted the grandchildren of brothers and sisters, and the children of uncles and aunts, additional classes of collateral heirs as contradistinguished from next of kin. It would have been very easy if it hadbeen so intended to have framed the Act so that the fourteenth section of the Act of 1833 would have applied, that when they should all be in equal degree they should continue to take as they had done as next of kin *per capita*;" but, it is said that the legislature, whether by design or inadvertence, had declared in the plainest and most explicit terms that the classes to whom the legislation relates should take *by representation*, and that "as to these new classes of collaterals, the rule of representation was established whether they stood in unequal or equal degrees of relationship to the intestate. As to them the rule of the fourteenth section of the Act of 1833 was changed."

It was as to these two new classes of collateral heirs, created by the Act of 1855, and to no other classes, that the *per capita* rule of the fourteenth section of the Act of 1833 was changed by the explicit provision of the Act of 1855 that such new classes should take "by representation." As to all other classes the fourteenth section of the Act of 1833 remained in full force; and the result was that the harmony of the intestate system was destroyed by applying the *per stirpes* rule to these two newly created classes of collaterals, while the *per capita* rule was uniformly observed as to all other classes of

collaterals when standing in the same degree of consanguinity to the intestate.

This irregularity in the intestate system was conspicuously brought to the attention of the profession by Hayes' Appeal, in 1879, and the sole purpose of the Act of 1885 was to correct this irregularity and perfect the harmony of the intestate system by applying the *per capita* rule to all classes of collaterals, including the two new classes created by the Act of 1855.

There is not a word in the Act of 1885 directing who, or what classes of kindred, shall take an intestate's estate; it simply directs how, or by what rule, those entitled to the estate under the existing provisions of the intestate laws shall share in its distribution, *when they all stand in the same degree of consanguinity* to the intestate. It made no change whatever in the classification of kindred as provided by the previously existing laws. Prior to June 30th, 1885, it had been settled, by an unvarying line of decisions of the highest tribunal of Pennsylvania, that the Act of 1855 had created two new classes of collateral heirs as contra-distinguished from next of kin, to-wit., grandchildren of brothers and sisters, and children of uncles and aunts.

Lane's Appeal, 28 *P. S.*, 487.
Brennemans's Appeal, 40 *P. S.*, 115.
Hayes' Appeal, 89 *P. S.*, 256.

It is manifest from a comparison of these cases with the Act of 1855 that the Legislature could not have intended by the latter Act to take first cousins out of the rank of collateral heirs, where they were placed by the Act of 1855, and reduce them to the rank of next of kin, where they belonged under the Act of 1833. There is not a syllable in the Act to indicate any such purpose, nor is any such purpose expressed in the title, which is as follows, to-wit.: "An Act providing for the manner in which estates of intestates shall be distri-

buted, where the distributees stand in the same degree of consanguinity to the intestate." Any legislation under that title, purporting to change the classification of kindred entitled to inherit an intestate estate under pre-existing laws, or to vary the prescribed order in which kindred should be entitled to take such estate, would be utterly void, because it would palpably violate Section 3 of Article III. of the Constitution of the State, which provides as follows, to-wit.:

"No bill, except general appropriation bills shall be passed, containing more than one subject, which shall be clearly expressed in the title."

It has been repeatedly held that this constitutional provision requires a title as an indispensable part of every Pennsylvania statute, the office of which is to afford notice to legislators and persons interested in proposed legislation, to the end that they may have an opportunity to be heard.

Dorsey's Appeal, 72 *P. S.*, 192.
Beckert vs. Allegheny, 85 *P. S.*, 191.
Road in Phoenixville, 109 *P. S.*, 44.
Rogers vs. Improvement Co., 109 *P. S.*, 109.
Sewickley vs. Sholes, 118 *P. S.*, 165.
Pierie vs. Philadelphia, 139 *P. S.*, 573.
Hatfield vs. Commonwealth, 120 *P. S.*, 395.
Commonwealth vs. Franz, 135 *P. S.*, 389.

Moreover the Act of 1885 cannot be construed as a repeal of the Act of 1855 and a revival of the Act of 1833, with respect to the rank of first cousins, without a palpable violation of Section 6 of the same Article of the Constitution, which provides as follows, to-wit.:

"No law shall be revived, amended, or the provisions thereof extended or conferred, by reference to its title only, but so much thereof as is revived, amended, extended or conferred shall be re-enacted and published at length."

It seems too plain to admit of reasonable controversy that the rank of first cousins was in no manner changed, nor intended to be affected, by the Act of 1885, which simply provides that they shall thereafter take *per capita* instead of *per stirpes*.

That first cousins take to the exclusion of second cousins has been directly ruled by the highest court of the State, without any dissenting opinion, before as well as since the passage of the Act of 1885. It was so ruled in Brenneman's Appeal, 40 *P. S.*, 115, decided July 24th, 1861. That decision established a rule of property which was enforced by the subordinate courts of the State, and never seems to have been called in question by court or counsel prior to this case. The learned judges of the Circuit Court, (McKennan and Acheson,) say, in their opinion, in reference to Brenneman's Appeal: "That decision has never been qualified or questioned by the Supreme Court;" and, therefore, they say "it is binding upon this court here, even were our own judgment different," and they add:

"But in truth we entertain no doubt whatever as to the correctness of the decision. In our opinion it is clearly in accordance with the terms and intent of the statutes."

After the decision of this case the same question was again brought before the Supreme Court of Pennsylvania in Rogers' Appeal, 131 *P. S.*, 382, decided January 6th, 1890. That case and this are essentially "on all fours." In each case the intestate died in 1886, after the Act of June 30th, 1885, went into force; and in each the claimants upon the fund for distribution were "first cousins, who were the children of deceased uncles and aunts, and second cousins, who were the grandchildren of deceased uncles and aunts." In Rogers' Estate the Orphans Court of Allegheny county distributed the fund among the first cousins to the exclusion of the second cousins. The learned leading counsel for the appellant

second cousins in this case represented the appellant in that case, and in an argument which the Supreme Court pronounces "ingenious and able," he failed to convince that learned court that Brenneman's Appeal "should be overruled, or even modified." We quote from the learned counsel's printed argument in that case, as follows, to-wit:

"That the Act of 1855 is repealed is evident from the inconsistency of that Act with the Act of 1885. The Act of 1855 repealed the 14th section of the Act of 1833; the Act of 1885 is a re-enactment of the 14th section of the Act of 1833."

We quote this particular paragraph of the argument in that case for the reason that counsel for the appellants state in their printed argument in this case that Brenneman's Appeal, as well as Rogers' Appeal, were based upon the construction of the Act of 1855, which they allege was repealed by the Act of 1885, prior to the death of Mary McAuley, and, therefore, they say "the decisions referred to do not have application to the law bearing on the rights of appellants" whose "rights are to be ascertained under the general statute of 1833." It is apparent, however, from the paragraph above quoted, that the Supreme Court considered the effect of the Act of 1885 in Rogers' Appeal, and that it was not understood by that learned tribunal as a repeal of the Act of 1855, or as in any way affecting the rule declared in Brenneman's Appeal with respect to the rights of first cousins to take the estate to the exclusion of second cousins.

It is a mistake to declare that the 14th Section of the Act of 1833 was ever repealed. It remained in full force after the passage of the Act of 1855, but was inapplicable to the two new classes of collateral heirs created by the latter Act, because of the express provision that those classes should take "by representation" whether they stood in equal or unequal degrees of consanguinity to the intestate. It is no less a mistake to suppose that the Act of 1885 repealed the Act of 1855

and reduced first cousins to the rank they occupied under the Act of 1833.

But conceding, for the sake of argument, that the Act of 1855 was repealed by the Act of 1885, and that the estate is to be distributed under the provisions of the Act of 8th of April, 1833, as seems to be claimed by the appellants, still the decree made by the Circuit Court must be affirmed. The Act referred to classified certain lineal and collateral heirs of decedents and prescribed the order of their succession to the real and personal estate, but provided in its 8th Section that there should be no representation admitted amongst collaterals after brother's and sister's children. But wherever there was a default of all persons designated in the Act as entitled to take by representation, then the descent and distribution of the estate was regulated by the 7th section, which provided that "In default of all persons hereinbefore described the real and personal estate of the intestate shall descend to and be distributed among the next of kin to such intestate."

In the report of the commissioners appointed to revise the civil code, by whom this Act was prepared, it is said, with reference to the use of the words "next of kin" in the Act, that "The provision that the next of kin shall take in every case not enumerated will, we believe, sufficiently identify the party, as the mode of computing kindred by the rule, viz: that of the civil law, is well understood and established."

This section of the Act was recognized by the courts and by the legal profession in Pennsylvania as establishing the right of the persons nearest in blood to the intestate, in default of persons in the designated classes, to take the estate; and the method of computing the degrees of kinship to ascertain the proximity of blood was to be by the civil instead of the canon law. This is shown by the case of Good vs. Herr, 7 *W. & S.*, 253, where the intestate left two uncles, an aunt

and the children of two deceased uncles. A settlement of the estate had been made and releases given by the administrators of an uncle who had died after the intestate, in which the children of the deceased uncle were recognized as entitled to the shares of their father. This was afterwards sought to be avoided on the ground that the children of the deceased uncles were not entitled to a share of the estate. Upon this question, Rogers, J., says: "The mistake was in the supposition that children of uncles deceased at the death of an intestate dying without issue, brother, sister, father or mother, were entitled to a distributive share of the estate of the intestate."

And in Montgomery vs. Petriken, 29 *Pa.*, 121, the same rule of descent is recognized by Lowrie, J., who says: "The intestate having derived her title by devise from her grandfather, and by descent from her father, her heirs, after her mother's life estate, are her next of kin on her father's side, that is to say, her father's brothers and sister. Cousins are not next of kin so long as there are any uncles or aunts, (unless they have been made so by the Act of 1855.)"

In Parr vs. Bankhart, 22 *Pa.*, 291, the intestate died in 1852, intestate, unmarried and without issue, but leaving two paternal aunts and the children of paternal uncles and of an aunt who died previous to the death of the intestate. In this case it was held that the surviving aunts were entitled to the estate to the exclusion of the children of the deceased uncles and aunts, upon the ground that they were one degree nearer of kin to the intestate. Upon this question, Agnew, President Judge, whose opinion was affirmed by the Supreme Court, says: "It is sufficient to say that the issue of the deceased paternal aunts and uncles are excluded by the express words of the 8th section, that there shall be no representation admitted amongst collaterals after brothers' and sisters' children. See Good vs. Herr, 7 *W. & S.*, 256; also *Hood on*

Executors, 509, Report of Commissioners. Besides they are not the next of kin according to the 7th section, the surviving aunts being one degree of kin nearer the intestate than the children of uncles and aunts."

In McDowell vs. Adams, 45 *Pa.*, 430, the personal estate of an intestate was claimed by the brothers and sister of the intestate's father and also by the maternal grandmother of the intestate, both parties claiming it under the 7th section of the Act of 1833 as being the next of kin within the meaning of that Act. In disposing of the claims of these parties Woodward, J., referring to the report of the commissioners who framed the law as to the mode of computing kindred, says:

"This was a clear recognition of the civil law rule of computation, and we are to presume that the legislature intended the next of kin should be ascertained according to it. As before intimated it has always prevailed in determining the right of administration, and although it has been laid down that the Statute of Distribution in England must be construed according to the common law, the more modern cases seem to have fully established that its construction, as to proximity of degrees of kindred at least, shall be according to the rules of the civil law. * * * We have rejected it both as to realty and personalty and have adopted the more sensible and just rule of the civilians. By that rule there can be no doubt that the grandmother of the intestate is one degree nearer to him than the uncles and aunt, and that she is next of kin within the meaning of our intestate Act."

Nor can the case of Perot's Appeal, 102 *Pa.*, 235, be sustained except upon the ground that in Pennsylvania next of kin refers to those nearest in degree of blood to the deceased. In that case the testator directed that his estate should be distributed "Among such persons and in such proportion as is provided for by the intestate laws of Pennsylvania, it being my will that in the event of my dying without issue, that after the death of my wife the whole of my estate shall vest in and be divided among my next of kin or heirs-at-law the same as though I had died intestate and unmarried." In this

case the testator died without leaving any relatives within the preferred classes created by this Act. His nearest relatives *ex parte materna* being the children of a deceased great-great maternal uncle and the grandchildren of said deceased great-great uncle, and the question was as to the right of the grandchildren of the great-great uncle to take a share of the estate. In that case it seems to have been conceded by the counsel for the grandchildren that they could not take under the Act of 1833, but the claim was made that they were entitled to take under the Act of 1855 on the ground that the words of that Act "grandchildren of brothers and sisters" refer to the grandchildren of such brothers and sisters which as a class, if all living, would have taken, that is to say, any brothers or sisters of the same generation who would have inherited if living, and if dead are represented by children or grandchildren. (See page 255.) The court below decided that the children of the deceased great-great uncle were entitled to take to the exclusion of the grandchildren, and this decision was affirmed by the Supreme Court. (See page 257.)

The argument of the appellants' counsel that the clause "next of kin" is used with reference to the last preferred class under the Act, and not as intended to designate nearness of relationship to the intestate, overlooks the fact that the section referred to provides that the estate shall be distributed among the next of kin "to such intestate." And even without these words the clause must be construed as referring to the intestate's next of kin, for it is his estate and his wife and children, etc., that are the subjects of the Act.

2 *Williams on Executors*, page 1512.

Nor could there have been any more apt words to show that the clause was intended to designate those nearest in blood to the intestate. The word "next" expressed fully that the persons who are to take after the default of the persons previously described were to be those nearest in degree of

relationship to the intestate. This is the ordinary and accepted definition of the word. Webster gives "next" as meaning "Nearest in place; having no other intervening; nearest in any gradation, as in degree, rank, quality, relationship," and this is also the meaning given by authors and text-book writers.

2 *Kent's Com.*, 422.

1 *Williams on Executors*, 420.

From the time of Lord Coke down to the present the term "next of kin" has been recognized as designating the person or persons nearest in degree of blood to an intestate, and if the object of the framers of this Act had been to embrace in one class all who were in any degree of consanguinity to the intestate, after default in the preferred classes, then surely other language would have been employed than that which by its ordinary and recognized use had a directly opposite meaning.

Under this Act (1833) as construed by the decisions of the Supreme Court of Pennsylvania, if Mary McAuley had left a single uncle living he would have taken the entire estate to the exclusion of the children of deceased uncles and aunts as next of kin to the intestate. So there being no uncle living the children of the deceased uncles would have taken the entire estate *per capita*, as her next of kin to the exclusion of grandchildren of deceased uncles.

The assertion that the Act of 1855 as construed by the Supreme Court of Pennsylvania in Brenneman's Apeal, *supra* took away from second cousins or cousins "once removed" that which they would otherwise have taken under the Act of 1833, is not sustained by a single decision of the Courts of Pennsylvania; on the contrary, every decision from 1833 down to the present time has recognized the rule that in default of the classes of kindred designated by the statute as entitled to take by representation, the estate passes to those

nearest in degree of relationship as computed by the civil law, to the exclusion of those in any more remote degree.

This fixed and received construction by the highest court in the State, not by a single adjudication, but by a series of decisions as to the construction of the Act of 1833, and the method of computing degrees of relationship to an intestate, has become a rule of property which this court will receive as final, "not because the State tribunal in such a case has any power to bind this court, but because, in the language of the court in the case of Shelby vs. Guy, 11 *Wheaton*, 361, 'A fixed and received construction by a State in its own courts makes a part of the statute law.'"

Green vs. Neal, 6 *Peters*, 298.

As said in the case last cited by McLean, J.:

"This has been done as a matter of principle in all cases where the decision of a State court has become a rule of property. In a great majority of the causes brought before the Federal tribunals they are called on to enforce the laws of the States. The rights of parties are determined under those laws, and it would be a strange perversion of principle if the judicial exposition of those laws by the State tribunal should be disregarded. These expositions constitute the law and fix the rule of property. Rights are acquired under this rule and it regulates all transactions which come within its scope."

See also:

Gardner vs. Collins, 2 *Peters*, 58.

Fairfield vs. County of Gallatin, 100 *U. S.*, 47.

We cannot doubt that a State statute relating to the distribution of interstate estates is essentially and pre-eminently a local law within the meaning of the repeated rulings of this court, giving effect to the construction which the highest tribunal of a State has placed upon its local laws. In Yonley vs. Lavender, 21 *Wallace*, 276, at page 280, it is said:

"The administration laws of Arkansas are not merely rules of practice for the courts, but laws limiting the rights of parties, and will be observed by the Federal courts in the enforcement of individual rights."

The principal cases are collected in a note at page 35 to the case of Burgess vs. Seligman, 107 *U. S.*, 20, cited in appellant's printed brief. In that case the Circuit Court rendered its decision before any construction had been placed upon the State statute by the State court, and this court adopted the construction of the Circuit Court, regardless of a different construction put on the same statute by the State court after the decision of the Circuit Court. In Fairfield vs. County of Gallatin, 100 *U. S.*, 47, this court reversed its former construction of a State statute in conformity with the previous construction of the State court, of which this court had not notice when it decided the former case. The rule is well settled that this court treats the construction put upon a State statute by the State court as if such construction were written into and made part of the statute itself, and such construction is observed as sacredly as the statute itself in the enforcement of individual rights.

If the succession to personal property is to be exclusively governed by, and the persons entitled to take as heirs and distributees are to be ascertained by, the law of the domicile of the deceased, as has been repeatedly ruled,—*Story on Conflict of Laws*, section 480–81, *Kent's Com.*, vol. 2, page 428, Goodall vs. Marshall, 11 *N. H.*, 88,—then there can be no question in this case of the right of the first cousins to take the entire estate, to the exclusion of the second cousins. And we submit that the decree of the Circuit Court must be affirmed.

D. F. PATTERSON,
JOHN W. DONNAN,
J. M. MCBURNEY,
Solicitors for Sarah Thompson, Eliza Monzingo, Martha Crawford and Catharine Gault.

E. P. & C. W. JONES,
Solicitors for Robert F. McAuley, Margaretta Shear and Susan Blakeley.

149 U.S. 608

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RECORD CASE No. 13,698.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

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Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

ALEXANDER M. BYERS, Administrator c. t. a. of Mary McAuley, Deceased, Appellant,

VERSUS

ROBERT F. McAULEY et al., Appellees.

PAPER BOOK OF CERTAIN APPELLEES.

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JOHN W. DONNAN,
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ALEXANDER M. BYERS, Administor *c. t. a.* of MARY McAULEY, Deceased, APPELLANT,

VERSUS

ROBERT F. McAULEY ET AL., APPELLEES.

ARGUMENT.

Mary McAuley, a citizen of Pennsylvania, resident in the county of Allegheny, died in said county on January 6th, 1886, intestate except with respect to her real estate, consisting of a house and lot in the city of Pittsburgh, which she directed by her will to be sold and the proceeds divided between two charitable institutions. Letters of administration with the will annexed were duly granted by the proper authority in said county, on January 12th, 1886, to Alexander M. Byers, the appellant, who gave bond as required by law, and took possession of the personal assets of the estate, consisting of moneys, stocks, notes and other articles of inconsiderable value, all situated in said county, and proceeded to administer the same. The nearest kindred of said decedent, at the time of her death, were first cousins, being the children of deceased uncles and aunts paternal as well as maternal.

On March 28th, 1887, Henry B. Shields, a resident and citizen of the State of Ohio, filed his bill in the Circuit Court of the United States for the Western District of Pennsylvania, in his right as assignee of James McAuley, a resident and citizen of the State of Kansas, (being a first cousin of the decedent,) and in right of his wife, Melissa Shields, also a resident and citizen of the State of Ohio, (and a second cousin of said decedent.) All of her first cousins, other than James McAuley, and second cousins, other than Melissa Shields, as well as A. M. Byers, her administrator, and the two charitable institutions mentioned in her will, were made parties defendant in said bill. The prayers of the bill, *inter alia*, were for an account of the assets and debts of the decedent's estate, and for distribution of the surplus among the plaintiff "and such other persons as may be found to be legally entitled thereto."

On May 10th, 1887, the administrator filed a plea to the jurisdiction of the Circuit Court, on the ground that, previous to the filing of the bill, he had rendered an account of his administration of the decedent's estate to the proper authority under the laws of Pennsylvania, which account, after due notice to parties interested by advertisement, had been presented in the regular and lawful course of proceeding to the Orphans Court of Allegheny county, on March 7th, 1887, when said account was by said court confirmed *nisi*, which confirmation, by virtue of a rule of said court, became absolute on March 18th, 1887, no exceptions to said account having been filed; and further, that as early as March 21st, 1887, said account was placed upon the audit list of said court for hearing and distribution of the surplus, and March 29th, 1887, fixed as the date for hearing.

This plea was overruled on May 18th, 1887, and the cause was regularly proceeded in, the administrator having been

required to account before a master, and a final decree having been made for the distribution of the surplus of the personal estate of the decedent among her thirteen first cousins to the exclusion of her second cousins. We represent first cousins, and are, therefore, interested in upholding the jurisdiction and proceedings of the Circuit Court.

There is no question of jurisdiction arising out of the citizenship of the parties or the amount in controversy; but it is contended on behalf of the appellant administrator that, on March 28th, 1887, the date of filing the bill, the Circuit Court had no jurisdiction of the administration and distribution of the decedent's personal estate, for the reason that the Orphans Court had previously acquired lawful jurisdiction of the same subject matter, and the assets of said estate were in contemplation of law in the custody of said court; wherefore, the jurisdiction of said court to hear and determine all questions relating to the administration and distribution of said estate had become exclusive, prior to March 28th, 1887.

In the case of Lawrence vs. Nelson, 143 *U. S.*, 215, decided by this court as recently as February 29th, 1892, at pages 223–4, it is said :

"The general equity jurisdiction of the Circuit Court of the United States to administer, as between citizens of different States, the assets of a deceased person within its jurisdiction, cannot be defeated or impaired by laws of a State undertaking to give exclusive jurisdiction to its own courts."

In Green's Admr. vs. Creighton, 23 *How.*, 90, a bill was filed in the Circuit Court in behalf of the sole heir of the estate of Wheeler Green, deceased, against the representative of the estate of the surety on the administration bond of Green's estate, for the purpose of establishing the plaintiff's claim, and for a discovery of assets, account and payment. The jurisdiction of the court was denied on the ground that the estate of the deceased surety was already in the course of

administration under the laws of Mississippi, and that "the estate had been reported to the probate court as insolvent several years before this suit was instituted, and that commissioners had been appointed by that court to receive and credit the claims, which commission was still open for the proof of claims." The Circuit Court dismissed the bill for want of jurisdiction, and that was the only question brought before this court on appeal. The decree dismissing the bill was reversed, and at pages 107–8, it is said:

"Thus it will be seen that, under the decisions of this court, a foreign creditor may establish his debt in the courts of the United States against the representatives of a decedent, notwithstanding the local laws relative to the administration and settlement of insolvent estates, and that the court will interpose to arrest the distribution of any surplus among the heirs. What measures the courts of the United States may take to secure the equality of such creditors in the distribution of the assets, as provided in the State laws (if any) independently of the administration in the probate courts, cannot be considered until a case shall be presented to this court."

In Payne vs. Hook, 7 *Wallace*, 425, a bill was filed in the Circuit Court for Missouri, by a citizen of Virginia, against the administrator of one Curtis' estate, to recover the share claimed by the plaintiff as next of kin of the decedent. A demurrer was sustained on the ground that the laws of Missouri give exclusive jurisdiction of the administration of decedents' estates to the Court of Probate, and that the estate of Curtis was in process of administration in the proper State court prior to filing the bill in the Circuit Court. In reversing the decree of the Circuit Court dismissing the bill, this court, at page 431, said:

"It is, however, well settled that a court of chancery, as an incident to its power to enforce trusts, and make those holding a fiduciary relation account, has jurisdiction to compel executors and administrators to account and distribute the assets in their hands. The bill under review has this object, and nothing more. It seeks to compel the defendant, Hook, to

account and pay over to Mrs. Payne her rightful share in the estate of her brother; and in case he should not do it, to fix the liability of the sureties on his bond."

Appellant's counsel contends that his position is not in conflict with this line of cases, and that it is in harmony with Williams vs. Benedict, 8 *How.*, 107, and Yonley vs. Lavender, 21 *Wallace*, 276, both of which relate to executions from judgments of the Federal Courts against decedent's estates. Williams vs. Benedict was a bill to enjoin such an execution against an estate that had been declared insolvent under the laws of Mississippi, which bill was dismissed on demurrer. The question on appeal is stated by this court, at page 111, as follows, to-wit:

"Whether a plaintiff who has obtained a judgment against the administrator of an intestate's estate, before it has been declared insolvent, has such a prior lien on the same as will entitle him to issue an execution and satisfy his judgment out of the assets, after the estate has been declared insolvent by the Orphans or Probate Court, and commissioners appointed for the purpose of distributing the assets equally among all the creditors."

Upon consideration of this question, this court said:

"As the judgment obtained by the plaintiffs in the court below did not entitle them to a prior lien, or a right of satisfaction in preference to the other creditors of the insolvent estate, they have no right to take in execution the property of the deceased which the Probate Court has ordered to be sold for the purpose of an equal distribution among all the creditors. The jurisdiction of that court has attached to the assets; they are *in gremio legis*. And if the marshal were permitted to seize them under an execution, it would not only cause manifest injustice to be done to the rights of others, but be the occasion of an unpleasant conflict between courts of separate and independent jurisdiction."

Yonley vs. Lavender is in the same line. It was an action of ejectment in a State court of Arkansas, in which the plaintiff was the purchaser at United States marshal's sale of the real estate of a decedent on execution from a judgment ob-

tained in the Circuit Court of the United States for the Eastern District of Arkansas, at the suit of Gautier, a citizen of Louisiana, against the administrator of said decedent's estate, several years after the administration of said estate had commenced and while it was in progress under the administration laws of the State of Arkansas. The State court decided against the title of Youley, who was the purchaser at marshal's sale, and that judgment was brought into this court for review. The question before the court was "whether the United States courts can execute judgment against the estates of deceased persons in the course of administration in the States, *contrary to the declared law of the state on the subject.*" It was said :

"The administration laws of Arkansas are not merely rules of practice for the courts, but laws limiting the rights of parties, and will be observed by the Federal Courts in the enforcement of individual rights. These courts, on the death of Du Bose and the appointment of his adminstrator, withdrew the estate from the operation of the execution laws of the State and placed it in the hands of a trustee for the benefit of creditors and distributees. It was therefore in contemplation of law in the custody of the Probate Court, of which the administrator was an officer and during the progress of administration was not subject to seizure and sale by any one. The recovery of judgment gave no prior lien on the property, *but simply fixed the status of the party and compelled the administrator to recognize it in the payment of debts.*"

There is a manifest distinction between the case at bar, in which the plaintiff seeks administration and distribution in accordance with the declared law of the State, and the two cases upon which appellant's counsel relies, in each of which the foreign creditor took proceedings in the Federal Court, not merely for the purpose of obtaining judgment to fix the amount of his claim, for which purpose the Circuit Court had unquestioned jurisdiction, but for the further purpose of gaining a preference over home creditors by means of execution and sale which would result in a distribution of the estate

contrary to the declared law of the State. In one case execution was restrained, and in the other the sale made upon the execution was held to convey no title to the purchaser, but in neither case was there any denial of the jurisdiction of the Federal Court to hear and determine the claim of a foreign creditor against the estate of a decedent already in course of settlement under the probate system of the particular State, nor any principle recognized that would oust the jurisdiction of the Federal Court in this case. On the contrary, in Yonley vs. Lavender, at page 284, after referring to the neglected obligations of the administrator, it is said:

"Gautier was not compelled to resort to the local Probate Court to secure the performance of these obligations, but could, had he chosen, have invoked the equity powers of the Circuit Court for the District of Arkansas, *to obtain a suitable measure of redress.* This he could have obtained in less time than it has taken to conduct this litigation; but this measure of redress would only have placed him on an equality with other creditors, as prescribed by the laws of Arkansas."

What does this mean, if it does not mean that the Circuit Court would have jurisdiction of his bill against the administrator to compel administration and distribution of the decedent's estate in accordance with the laws of the State? And is that not the precise character of the proceeding now under review in this case?

It seems plain, from all the cases, that the Circuit Court had the clear right to entertain this bill for the purpose of determining the rights of the complainant with respect to the estate of Mary McAuley, deceased. Being a non-resident, and suing in the rights of non-residents, he was not bound to resort to the Orphan's Court, but had the right under the Constitution and laws of the United States to have his claim as distributee heard and determined by the Circuit Court in accordance with the declared law of the State; and,

if that be true, there was no error in overruling the administrator's plea to the jurisdiction of the Circuit Court.

The jurisdiction to hear and determine the rights claimed by the plaintiff necessarily involved a discovery and account of the assets of the estate, and the ascertainment of the next of kin who were entitled to share in the distribution, otherwise the suit of the plaintiff would be utterly fruitless. Such discovery and accounting could be no more of a burden upon the administrator than his duty to appear and defend a suit brought by a foreign creditor in the Circuit Court to fix the amount of his claim against the estate. Having already correctly accounted to the Orphans Court, he had nothing more to do with respect to the assets accounted for, and he actually did nothing more, than render the same account to the master appointed by the Circuit Court. In order to fix and determine the plaintiff's rights in the decedent's estate it was necessary to proceed further and ascertain who were entitled to share in the distribution, in accordance with the laws of the state, and whether or not the plaintiff was a lawful distributee, and to what extent.

To deny the jurisdiction of the Circuit Court to ascertain and fix the plaintiff's claim upon the estate, in the manner above indicated, would be to declare that the plaintiff, although a citizen of a different State, had no lawful resort other than the Orphans Court for the establishment of his claim; and to so declare would be contrary to the whole current of adjudication of this court, including Williams vs. Benedict and Yonley vs. Lavender.

This disposes of the first, second and fourth assignments of alleged error; but the third and fifth assignments allege error on the part of the Circuit Court in proceeding to decree distribution of the entire surplus in the hands of the administrator, on the ground that said surplus was in contemplation

of law in the custody of the Orphans Court, and that it is well settled that the chancery powers of the Federal Courts do not go to the extent of authorizing the seizure of property already in the lawful custody of a State court or its officer.

Borer vs. Chapman, 119 *U. S.*, 587, was a bill filed in the Circuit Court for Minnesota against the administrator with the will annexed and legatees of a testator on behalf of a creditor of the estate, who endeavored to subject certain asseets in Minnesota to the payment of his claim. The defense was that the assets were held by the legatees in pursuance of a decree of the Probate Court of San Francisco. This court held that the administration in California was merely ancillary, and the primary administration was that of the testator's domicil in Minnesota; that the plaintiff creditor was not a citizen of California nor a resident there; that he was no party to the administration proceedings there, and was not bound to make himself a party. "If he had chosen he could have proved his claim there and obtained payment, but he had a right to await the result of the settlement of that administration, and look to such assets of Gordon as he could subsequently find in Minnesota, whether originally found there or brought there from California by the executors or legatees of Gordon's estate. The assets in California finally distributed there, and brought into Minnesota by the executor or by any legatee, remained assets in Minnesota for the payment of any unpaid creditors choosing that forum." After holding that such assets were impressed with a trust of which chancery had jurisdiction, and that the equity jurisdiction of the Federal Courts is subject to neither limitation or restraint by State legislation, with the single qualification that they cannot seize or control property while in the custody of a court of the State, and that the exception did not apply in that case because the assets sought to be marshaled in favor

of the plaintiff were not in possession of any other court, the decree of the Circuit Court in favor of the plaintiff was affirmed.

The practical result of that case was that the distribution of a decedent's estate, as decreed by a State court of competent jurisdiction and carried into execution, was afterwards overhauled by the Circuit Court to the extent of enforcing the claim of a creditor who, by reason of his citizenship of a different State, was not bound to go into the State court for the enforcement of his claim. Would the Federal Court do less at the suit of a distributee, who was beyond the reach of the process of the State court, who was not a party to the proceedings in the State court, and to whom nothing had been awarded by the decree of the State court making distribution of the surplus?

There seems to be no material distinction between Payne vs. Hook, *ante*, and the case now under review. In each case the bill was filed in the right of a non-resident distributee against the primary administrator who was proceeding to settle the decedent's estate under the control and authority of the proper tribunal of the State. In the former case "it appeared from the bill that Hook had not made his final settlement" in the State court, and in this case it appears from the printed record, at page 14, that the account attached to the administrator's plea as the account presented by him and confirmed by the Orphans Court, prior to the filing of the bill in the Circuit Court, is "The first and partial account of Alexander M. Byers, administrator," etc. True enough the Circuit Court had not gone to the extent in Payne vs. Hook of ordering the administrator to account and decreeing distribution of the surplus of the estate, it having dismissed the bill on demurrer; but, in remanding the cause with instructions, it seems clear that this court intended to instruct the

Circuit Court to proceed to account and distribution, for it is said:

"'As the citizen of one State has the constitutional right to sue a citizen of another State in the courts of the United States, instead of resorting to a State tribunal, of what value would that right be if the court in which the suit is instituted *could not proceed to judgment, and afford a suitable measure of redress?* The right would be worth nothing to the party entitled to its enjoyment, as it could not produce any beneficial results. But this objection to the jurisdiction of the Federal tribunals has been heretofore presented to this court, and overruled:" citing Hyde vs. Stone, 20 *How.*, 175; Suydam vs. Broadnax, 14 *Peters*, 67; Union Bank vs. Jolly's Administrators, 18 *How.*, 503.

In Hyde vs. Stone, 20 *How.*, 170, at page 175, it is said:

"The courts of the United States are bound to proceed to judgment, and to afford redress to suitors before them, in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction."

All the cases agree that a non-resident creditor or distributee of a decedent's estate that is in process of settlement under the probate system of a State is not bound to go into the State court, but that it is his right to invoke the jurisdiction of the Circuit Court, which court is bound to proceed to judgment and afford a suitable measure of redress; and the only recognized limitation seems to be in cases where the judgment is against an insolvent estate, and then execution will not be allowed to give the non-resident a preference in the distribution contrary to the declared law of the State. There seems to be no doubt about the right and duty of the Circuit Court to entertain the bill in this case and proceed to judgment; and the only question is whether or not, by its decree for distribution of the entire surplus, it afforded a proper measure of redress.

There is no pretense that any preference was given to the suitor in the Federal Court, nor that the laws of the State re-

lating to the settlement and distribution of decedents' estates were in any way disregarded or violated. On the contrary, if the Orphans Court had proceeded to distribution in accordance with the settled law of the State, it would necessarily have decreed the surplus to the same distributees, in the same proportions, that it was awarded by the Circuit Court.

Independent of all other considerations it plainly appears from the record that the Orphans Court practically surrendered its control of the distribution of the surplus before the Circuit Court had proceeded to the extent of requiring the appellant to account before its master.

By reference to pages 131–134 of the printed record it appears that, under date of March 29th, 1887, (the date fixed for hearing in the Orphans Court, and the day after the filing of the bill in the Circuit Court,) the Orphans Court proceeded to take testimony affecting the distribution, and further testimony of like character was taken April 7th, 1887, and May 5th, 1887. On the latter date the proceedings begun in the Circuit Court on March 28th, 1887, were for the first time formally brought to the attention of the Orphans Court by means of the plea of the administrator, printed at page 134 of the record, to which was attached a copy of the bill filed in the Circuit Court. It further appears that on May 10th, 1887, five days after filing his plea in the Orphans Court, the administrator filed his plea in the Circuit Court, and thereby for the first time brought to the attention of that court the proceedings theretofore pending in the Orphans Court. The plea in the Circuit Court was promptly set down for argument, duly argued and overruled, on May 18th, 1887; and properly overruled, as we have endeavored to show, because that court had unquestionable jurisdiction to entertain the bill for the purpose, at least, of determining the right of the complainant to share in the distribution of the decedent's estate.

It appears at pages 141–2 of the printed record that, on May 21st, 1887, the administrator filed his further plea in the Orphans Court, whereby he brought to the notice of that court the further proceedings taken in the Circuit Court since the filing of his former plea, and prayed the judgment of said court whether it would or should proceed further in the premises. The entire proceedings of the Orphans Court, printed in the record at pages 127 to 146, are certified up to February 15th, 1889, from which it appears that after the proceedings in the Circuit Court were brought to the notice of the Orphans Court, by the pleas of the administrator, the latter court never exercised any further jurisdiction over the administration and distribution of the decedent's personal estate, other than by an order made December 24th, 1887, approving the exchange of certain stocks, which exchange was approved by the Circuit Court by its order dated December 10th, 1887. (See printed record, pages 142–5.)

While the Orphans Court never formally passed upon the administrator's pleas to its further jurisdiction, it never exercised any further jurisdiction in the matter, and the case in the Circuit Court proceeded regularly. Answers were filed by nearly all of the defendants, followed by replication and the taking of testimony before an examiner duly appointed, and on May 29th, 1888, a decree was entered, printed at page 72, ordering the administrator to account before Cicero Hasbrouck, Esq., who was appointed master with authority to take testimony and report a schedule of distribution.

From the master's report, beginning at page 75 of the printed record, and the minutes of the proceedings before the master, beginning at page 87, it appears that the administrator filed with the master a copy of his administration account that had been theretofore confirmed by the Orphans Court, and also a supplemental account of his further administration

following the filing of his confirmed account. Exceptions were filed before the master to the supplemental account; but no exceptions to the account that had been confirmed by the Orphans Court were filed by any party interested.

It clearly appears from the foregoing references to the record that the Orphans Court tacitly relinquished its authority over the assets of the decedent's estate and whatever jurisdiction it had acquired of the administration and distribution thereof, on May 5th, 1887, when it was first formally notified of the proceedings in the Circuit Court; and, further, that the Circuit Court, through its master, and without objection on the part of any party interested or claiming an interest, adopted everything that the Orphans Court had previously done with reference to the decedent's estate, and took up the administration and distribution of said estate precisely where the Orphans Court had tacitly surrendered its control without objection or any sort of conflict; and, thereafter, all parties submitted to the jurisdiction of the Circuit Court without objection, and without any effort on the part of the appellant, or any other party, to proceed further in the Orphans Court.

The administrator has no interest in this appeal beyond his proper desire to have the protection afforded by the decree of a court of competent jurisdiction for the distribution of the decedent's estate; and, as there is no dispute that the Circuit Court would have jurisdiction in the absence of the previous proceedings in the Orphans Court, and as the Circuit Court adopted and approved all that had been done under the control of the Orphans Court until the latter court tacitly surrendered its further exercise of jurisdiction in the matter, and as all interested parties submitted themselves thereafter to the jurisdiction of the Circuit Court, we submit that the decree of the latter court is ample protection to the appellant, even if there should be doubt of the authority of said court to as-

sume jurisdiction, regardless of the previous proceedings in the Orphans Court. The only obstacle in the way of the undisputed jurisdiction of the Circuit Court was the alleged previously acquired exclusive jurisdiction of the Orphans Court, and that obstacle was completely removed, as we contend, by the acquiescence of the Orphans Court, and of all interested parties, in the jurisdiction assumed by the Circuit Court. That acquiescence obviated all manner of adversary decrees and unseemly conflicts; and the decree for distribution, being in exact accordance with the laws of the State as theretofore declared and since confirmed by its highest tribunal, is the same that the Orphans Court would necessarily have made if it had proceeded to a decree of distribution.

Nearly six years have elapsed since the Orphans Court was notified by the administrator's pleas of the proceedings in the Circuit Court, and, during that long period, it has never of its own motion, nor on the motion of any party interested, assumed to exercise any sort of jurisdiction with respect to any of the matters with which the Circuit Court assumed to deal, other than in the single instance when, on the application of the administrator, it approved the order of the Circuit Court relating to the exchange of certain stocks, and that action may be fairly treated as an affirmative declaration that the Orphans Court fully acquiesced in the action of the Circuit Court, and had abandoned its custody and control of the personal assets of the decedent's estate.

We know of no rule denying the power of a State court to surrender its dominion over property of which it had been the first to secure the custody, in favor of a court of concurrent jurisdiction. It may stay its executions and set aside levies made thereunder, or otherwise withdraw from the custody of property that, in contemplation of law, is in its possession

under its process; and its failure to take any action, of its own motion or on the motion of its suitor, during a period of five years, after notice that a court of concurrent jurisdiction has assumed the custody and control of the property, ought to be conclusive of its abandonment. In Dent's Appeal, 22 *P. S.*, 514, it is held that a court having jurisdiction of an ancillary administration may at its discretion proceed to decree distribution of the surplus in the hands of the ancillary administrator, or transmit the same to the forum of the primary administration.

We submit that the proceedings under review may be properly affirmed on the single ground that the Orphans Court had surrendered and abandoned its custody and control of the decedent's estate in favor of the Circuit Court, and that all parties interested in the distribution of said estate submitted without objection to the jurisdiction of the latter court.

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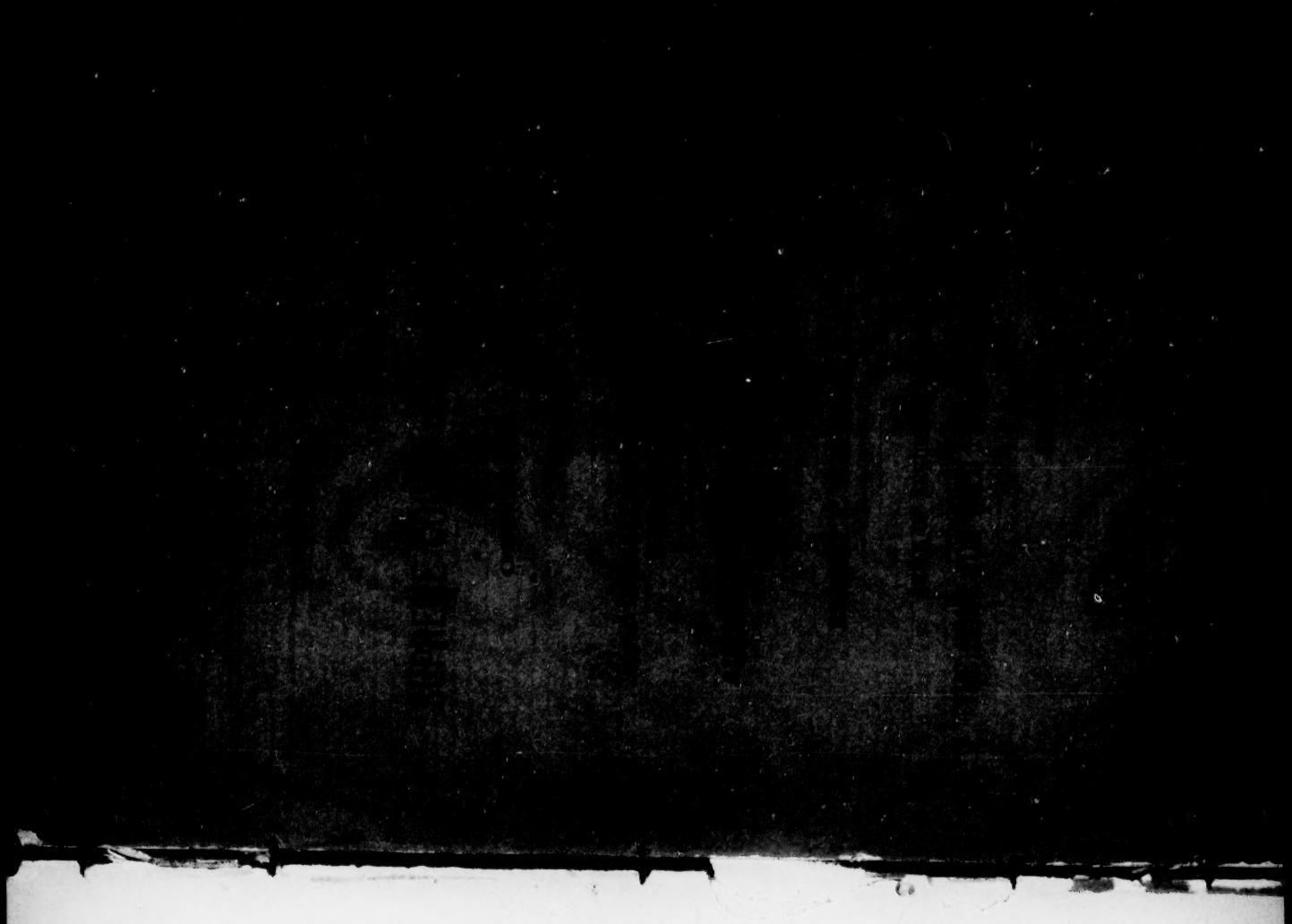

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RECORD CASE No. 13,698.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

Term No. 124.

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

ALEX'R M. BYERS, Administrator, c. t. a., of Mary McAuley, deceased, Appellant,

VERSUS

ROBERT F. McAULEY, et al., Appellees.

BRIEF OF ARGUMENT OF ATTORNEY FOR

"THE HOME FOR AGED PROTESTANT WOMEN," Appellee.

GEORGE C. BURGWIN,
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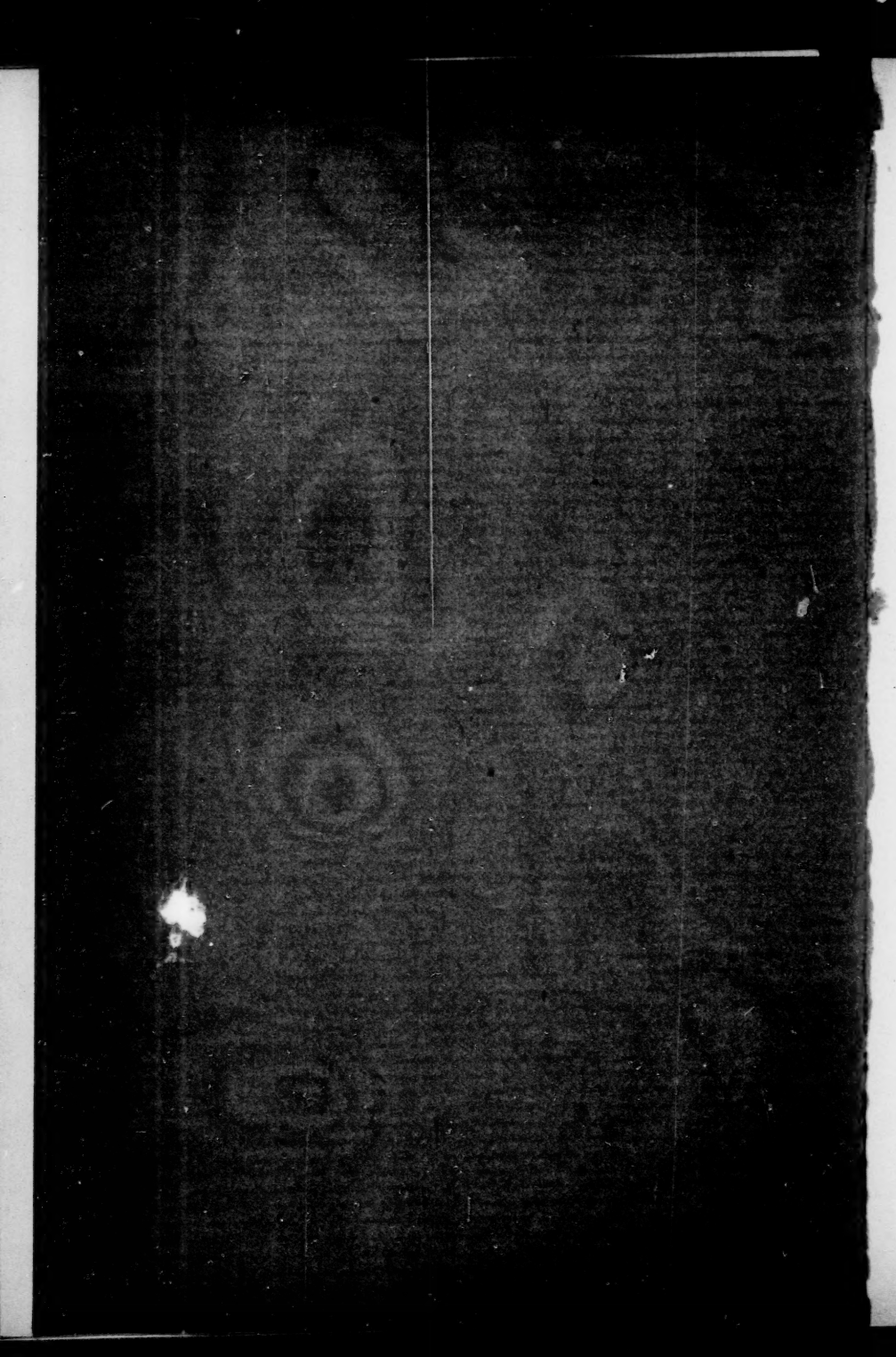

IN THE

Supreme Court of the United States.

RECORD CASE No. 13,698.

No. 124 of October Term, 1892.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

ALEXANDER M. BYERS, Administrator, *c. t. a.*, of MARY MCAULEY, Deceased, *Appellant*,

VERSUS

ROBERT F. MCAULEY, *et al*, *Appellees.*

BRIEF OF COUNSEL FOR "THE HOME FOR AGED PROTESTANT WOMEN," APPELLEE.

POINTS OF LAW.

So far as the appeal in this case affects the Home for Aged Protestant Women, one of the appellees, it concerns the question of the right of the Circuit Court to direct the execution of the trust for the sale of the real estate on Duquesne Way, and the division of the proceeds between the Home for Aged Protestant Women and The Home for the Friendless.

Had the Court jurisdiction to enforce this trust?

The facts in the case, as found by the Court below (see record, p. 109), so far as they are pertinent to this issue, are as follows :

In the year 1871, James McAuley, a resident of the City of Pittsburgh, in the County of Allegheny, and Commonwealth of Pennsylvania, died, having first made his will, dated November 26th, 1879, *inter alia*, devising to his sisters Margaret and Mary a house and lot on Duquesne Way, in the city of Pittsburgh.

Margaret died in 1871, a few months after her brother, and thereupon her interest in said property passed to her sister Mary, who died January 6th, 1886, seized of said real estate, and leaving also a large personal estate. She died intestate, but she left an instrument of writing, signed by her (the body thereof being also in her hand-writing), of which the following is a copy:

> "By request of my dear brother my house on Duquesne Way is to be sold on my death, and the proceeds to be divided between The Home of the Friendless and the Home for Protestant Destitute Women."

On January 12th, 1886, this instrument was admitted to probate in the Register's Office of Allegheny County, as the will of Mary McAuley.

The original bill brought in the Circuit Court of the United States for the Western District of Pennsylvania was brought against the administrator and the other parties interested in the estate. It recited the fact of Miss Mary McAuley's death, the probate of her will, which was alleged to be void, asserted interest in the property in the administrator's hands, and prayed, *inter alia*, for the following relief:

> "1, 2, 3, 4, That the said alleged probate of the said alleged will be declared void, the bequests therein lapsed, and the said alleged will void; that the administrator be restrained from selling the real estate, and that partition of said real estate be made among petitioner and the other parties in interest therein."

The Court below held that this instrument of writing need not be regarded as the will of Mary McAuley, but might be accepted as a valid declaration on the part of Mary McAuley of

the terms of a trust upon which she held the property, and that as such, it could be enforced, it being plain upon the face of the paper that this particular property had been devoted by her brother to charitable purposes, to take effect at her death; that he evidently had communicated his intention to her, and that she had accepted the trust; and that Miss Mary McAuley, having perfect knowledge of her brother's intention, and having undertaken to carry out his purpose by this instrument of writing, it was not for the next of kin to question the existence of a trust thus recognized by her, or to gainsay her deliberate act.

It will be observed that the Court regarded this property not as part of the estate of Mary McAuley, but as property held by her in trust for the beneficiaries named in the instrument of writing. It was not part of the assets of her estate to be administered.

It thereupon proceeded to enforce it by directing the administrator, *c. t. a.*, as trustee, to sell the real estate and distribute the proceeds, less costs and expenses, to the two beneficiaries, the Court having also found that "The Home for Protestant Destitute Women," one of the beneficiaries was a misnomer, the true title being the "Home for Aged Protestant Women."

The principle seems to be well settled that if a testator makes a devise in terms absolute, but upon a private understanding with his devisee, whether by the latter's express promise or his assent implied from silence that he will apply the devised estate to some purpose designated by the testator, a trust arises which a Court of Equity would enforce, unless unlawful in itself.

Lewin on Trusts, 70.
Wallgrave *vs.* Tebbs, 6 K. & J., 313, 321.
Tee *vs.* Ferris, Ibid, 357.
Springett *vs.* Jennings, Law Rep. 10 Eq., 483.
3 Redfield on Wills, 485.
Story's Eq. Jurisdiction, 9th, 250.
Hoge *vs.* Hoge, 1 Watts, 163.
Church *vs.* Ruland, 64 Pa., 434, 442.

"Generally if a testator devise an estate to A, *the beneficial owner upon the face of the will*, but upon the understanding between the testator and A, that the devisee will, as to a part or even the entirety of the beneficial interest, hold upon any trust which is lawful in itself in favor of B, the Court at the instance of B, will affect the conscience of A; and decree him to execute the testator's intention."

Lewin on Trusts [*70].
Citing Kingsman *vs.* Kingsman, 2 Ves. 559.

"If a testator in making his will should declare by way of recital that a certain parcel of land or sum of money was held by him upon trusts therein stated, and the will should be so informally executed that it could not be proved in a Court of Probate; still, if it was signed by him, it would seem to be as good proof of the trust as letters or other memoranda signed by the party found after his death. In such case the will could have no effect in creating the trust. It would be simply proof in writing of a trust already created and existing at the date of the will."

1 Perry on Trusts, Sec. 91.

Qualifying Lord Northington, who had laid down a proposition too broadly expressed:

> "Where a person knowing that a testator in making a disposition in his favor, intends it to be applied for purposes other than his own benefit, either expressly promises, or by silence implies, that he will carry the testator's intention into effect, and the property is left to him upon the faith of that promise or undertaking, it is in fact a case of trust."

Wallgrave *vs.* Tebbs, 2 K. & J., 313, 321.

In such a case the Court will not allow the devisee, "the beneficial owner on the face of the will," to set up the statute of wills."

Evidently James McAuley had communicated his intention to his sister, and she had accepted the trust. Trusts of this

nature may be created by silent assent as well as by expressed words.

Byn *vs.* Godfrey, 4 Ves., 10.
Paine *vs.* Hale, Ibid, 475.
Brook *vs.* Chappell, 34 Wis., 405.

"The declaration of the trust by the residuary legatee is stronger than if determined by a Jury."

Lord Hardwick in Sheffield *vs.* Duchess of Buckingham of 1 Atk. 629.

We contend, therefore, that in construing this paper of Mary McAuley to be a declaration of trust, and enforcing it by decreeing a sale and distribution, the Circuit Court was exercising lawful jurisdiction. It was a trust which could be enforced in the Courts of Common Pleas of Pennsylvania in the exercise of their equity jurisdiction. The Act of April 15, 1836, Section 15, Purdon's Digest, page 1615, provides as follows:

> "Whenever any assignment, conveyance or transfer (excepting assignments or transfers for the benefit of creditors, as hereinbefore mentioned) shall have been made, or shall hereinafter be made, by deed, will, or otherwise of any state, real or personal, to any person or corporation in trust, or for the use or benefit of any person or association of persons or corporation; also, whenever any trust shall arise by operation or implication of law, the Court of Common Pleas of the county in which any such trustee shall have resided at the commencement of the trust, or, if such trustee be a corporation, in which such corporation is situate, or in which its principal officer shall have resided as aforesaid, shall exercise the jurisdiction and powers given by law in regard to such trusts; *Provided*, that nothing herein contained shall extend to trusts created by will and vested in executors or administrators, either by the words of the will or by the provisions or operations of law, whenever such executors or administrators are by the existing laws amenable to the Orphans' Court."

assets, may be construed merely as an incident of its power to enforce trusts and make those in a fiduciary relation account.

Broderick's Will, 21 Wall, 504

The sale and distribution by the Circuit Court has been acquiesced in by all the parties in interest. The plaintiffs in the original bill have not prosecuted their appeal. The administrator is protected by the order of sale obtained from the Orphans' Court as well as from the Circuit Court. Who then can be heard to complain?

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RECORD CASE No. 13,698.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

Term No. 124.

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

ALEX'R. M. BYERS, Administrator c. t. a., of Mary McAuley, deceased, Appellant,

versus

ROBERT F. McAULEY, et al., Appellees.

Paper Book of the "Pittsburgh and Allegheny Home for the Friendless," Appellee.

THOS. PATTERSON,
Attorney for Appellee.

IN THE

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RECORD CASE No. 13,698.

OCTOBER TERM, 1892.

No. 124.

ALEX'R. M. BYERS, Administrator c. t. a., of Mary McAuley, deceased, Appellant,

versus

HENRY B. SHIELDS, et al., Appellees.

Brief of Counsel for the "Pittsburgh and Allegheny Home for the Friendless," Appellee.

POINTS OF LAW.

The argument of counsel for administrator, appellant attacks the jurisdiction of the Circuit Court, as we understand it, upon two grounds:

FIRST. The Orphans' Court has exclusive jurisdiction of the settlement of the estates of decedents, and when that jurisdiction attached to the assets of the estate, they were in *gremio legis*, and no other Court could interfere with the jurisdiction thus acquired.

SECOND. That the proceeding before the Orphans' Court

to distribute the funds in the hands of the administrator was a "suit," and although concurrent jurisdiction were conceded to the Circuit Court, the actual jurisdiction of the Orphans' Court, by a suit commenced before it, was exclusive of the Circuit Court.

As to the first ground:

While it is true that in Pennsylvania the Orphans' Court has exclusive jurisdiction of the settlement of estates of decedents, and a bill will not lie to any Court of Equity of that State to, in any manner, interfere with the settlement carried forward before that tribunal; yet it has been distinctly settled that the Federal Courts are not limited in their equity jurisdiction to the corresponding equity jurisdiction of the State Courts.

This principle was clearly set forth in the opinion of Justice Davis in the leading case of

Payne *vs.* Hook, 7th Wall., 425.

In that case the public administrator of Calloway County, Missouri, had taken charge of the estate, filed his accounts with the Probate Court, had made settlements thereof, and obtained from plaintiff a receipt in full for her share of the estate. The plaintiff claimed that the settlements had been false, that the administrator had withheld a true inventory; had used the money of the estate for his private gain, and had obtained the receipt from her by false representations. The same objection was made to the jurisdiction of the Circuit Court as is made here, viz: That the Probate Court had exclusive jurisdiction of the accounts of the administrator. Mr. Justice Davis disposes of the objection as follows:

"The theory of the position is this; that a Federal Court of chancery, sitting in Missouri, will not enfore demands against an administrator or executor, if the Court of the State, having general chancery powers, could not enforce similar demands.

In other words, as the complainant, were she a citizen of Missouri, could obtain a redress of her grievances only through

the local Court of Probate; she has no better or different rights, because she happens to be a citizen of Virginia.

"If this position could be maintained, an important part of the jurisdiction conferred on the Federal Courts by the Constitution and laws of Congress, would be abrogated. As the citizen of one State has the Constitutional right to sue a citizen of another State in the Courts of United States, instead of resorting to a State tribunal, of what value would that right be, if the Court in which the suit is instituted could not proceed to judgment and afford a suitable means of redress? The right would be worth nothing to the party entitled to its enjoyment, as it could not produce any beneficial results.

"The Circuit Court of the United States for the District of Missouri, therefore had jurisdiction to hear and determine this controversy, notwithstanding the peculiar structure of the Missouri probate system, and was bound to exercise it, if the bill, according to the received principles of equity, states a case for equitable relief."

The doctrine of this case, so far as we can find, has never been criticised. On the contrary it is followed and approved in a number of cases; among which are the following:

In

Chicago, &c., R. R. *vs.* Whitton, 13 Wall. 270,

a cause of action was created by the State legislature for death resulting from a wrongful or negligent act, with a proviso "that such action shall be brought for a death caused in this State, and in some Court established by the Constitution and laws of the same." It was there held that the Federal Court had jurisdiction, Mr. Justice Field saying: "Whenever a general rule as to property or personal rights, or injuries to either, is established by State legislation, its enforcement by a Federal Court, in a case between proper parties is a matter of course, and the jurisdiction of the Court, in such cases, is not subject to State limitation."

Following after this came the case of

Yonley *vs.* Lavander, 21st Wallace, 276,

which is easily reconciled with Payne *vs.* Hook, and in fact reaffirms its doctrines. In this case the plaintiff claimed the land in controversy as purchaser at an execution sale on a judgment rendered by the U. S. Circuit Court of Arkansas in favor of Gautier against the administrator of DuBose. It was claimed on part of the DuBose estate that the sale passed no title for the reason that there was no power in the Federal Courts to issue process against the estate of a deceased person, and in such manner to interfere with the regular administration of such estate in the proper Courts of the State. It appeared that the effect of administration in Arkansas is to place the whole estate in the custody of the law and leave it there until administration has been completed. The effect of a judgment obtained in another Court of the State is to establish the demand of the creditor and remit it to the probate Court for classification and payment. No execution process could issue on the judgment for its collection as against a living person. The Supreme Court of the United Statates affirming the judgment of the Supreme Court of Arkansas held that the administration laws of a State will be observed by the Federal Courts in the enforcement of private rights, and that a creditor could not gain priority or dispute the legal order of administration and settlement of the estate by the mere fact of having obtained a judgment in the Circuit Court. The case is valuable as marking the dividing line of jurisdiction. The opinion expressly intimates that the entire estate could have been brought into the Circuit Court for settlement had the judgment creditor in that Court sought for such relief. Mr. Justice Davis says: "Gautier was not compelled to resort to the local Probate Court to secure the performance of these obligations, but could, had he chosen, have invoked the equity powers of the Circuit Court for the District of Arkansas, to obtain a suitable measure of redress. This he could have obtained in less time than it has

taken to conduct this litigation; but this measure of redress would only have placed him on an equality with other creditors, as prescribed by the laws of Arkansas."

The recent case of

Borer *vs.* Chapman, 119 U. S. 587,

distinctly reaffirmed the doctrine of the foregoing cases. In that case the testator, John Gordan, was resident of the State of Minnesota. Ancillary administration was conducted by one of his executors, resident in California, and his account approved by the Probate Court of San Francisco. Under the decree of that Court the balance in his hands was paid over to Geo. D. Snow, the residuary legatee, who was also an executor of the will, resident in Minnesota. The plaintiff having recovered judgment againt Geo. D. Snow in the Circuit Court of the United States for the District of Minnesota, in his capacity as executor, the judgment was certified to the Probate Court of Minnesota as a claim duly allowed and adjudged against the estate of John Gordan, deceased. Afterwards a bill was filed in the Circuit Court by the same plaintiff to marshall the assets of the estate of John Gordan, deceased, in which the administrator, d. b. n. of Gordan, the executor of Snow, and Harriet Cecilia Snow, his wife and residuary legatee, were made defendants. This bill was sustained by the Circuit Court, the opinion filed holding

"That this Court has jurisdiction to grant the relief asked, for by complainants bill, for the reason that a Court of equity can decree that a legatee under a will, after distribution, holds property in trust when valid debts of the decedent remain unpaid, and follow the property or its proceeds in the legatee's hands." On appeal to the Supreme Court the decree of the Circuit Court was sustained.

Mr. Justice Matthews, delivering the opinion of the Court, says:

"It is upon the ground of such a trust that the jurisdiction

of Courts of Equity primarily rests in administration suits, and in creditors bills brought against executors or administrators, for the purpose of charging them with a liability to apply the assets of the decedent to the payment of his debts. As a part of the ancient and original jurisdiction of Courts of Equity, it is vested, by the Constitution of the United States and the laws of Congress in pursuance thereof, in the Federal Courts, to be administered by the Circuit Courts in controversies arising between citizens of different States. It is the familiar and well settled doctrine of this Court that this jurisdiction is independent of that conferred by the States upon their own Courts, and can not be affected by any legislation except that of the United States."

The cases of

Ellis *vs.* Davis, 109 U. S. 485,

Gaines *vs.* Fuentes, 92 U. S. 10,

and Brodericks Will, 88 U. S. 503,

are cases discussing the effect of probate of a will, in regard to which the principle is announced that the decree admitting a will to probate will be treated by the Federal Courts with the same respect as the laws of the State in which the probate of the will occurs give to it. If conclusive in the State Courts, it will be taken as conclusive by the Federal Courts. These cases do not at all impair the doctrine of Payne *vs.* Hook.

Prior to the decision in Payne *vs.* Hook, several decisions of this Court had pointed in the same direction, among them were the cases of

Suydam *vs.* Broadnax, 39 U. S. 14,

Union Bank *vs.* Jolley's Admr., 59 U. S. 18,

Hyde *vs.* Stone, 61 U. S. 20,

and Green's Adminrx *vs.* Creighton, 64 U. S. 23.

The last is an instructive case. After a full review of the prior decisions, Justice Campbell there says:

"Thus it will be seen that under the decisions of this

Court, a foreign creditor may establish his debt in the Courts of the United States against the representatives of a decedent, notwithstanding the local laws relative to the administration and settlement of insolvent estates, and that the Court will interpose to arrest the distribution of any surplus among the heirs."

The case of

William *vs.* Benedict, 8 Howard 112,

cited by appellants' counsel, was similar in facts to Yonley *vs.* Lavender. It held that a creditor of an estate could not obtain preference over other creditors by obtaining a judgment in the Circuit Court of the United States, in violation of the equality provided by State statute. Justice Grier adds the following significient remark:

"But we wish it to be understood that we do not intend to express any opinion as to the right of State legislation to compell foreign creditors, in all cases, to seek their remedy against the estates of decedents in the State Courts alone, to the exclusion of the jurisdiction of the Courts of the United States. Tbat will present an entirely different question from the present."

In Fosters Federal Practice, Vol. 1, Sec. 9, the rule is thus stated:

"A Court of the United States, through a spirit of judicial comity, will usually refuse to interfere with property in the custody of a State Court. * * * This rule did not prevent the filing of a bill in equity against an administrator or an executor during the pendency of probate proceedings in a State Court. * * Property is deemed to be in the custody of a Court from the time when a suit or action, seeking to have it put there has been actually begun, either by levy under a writ in a proceeding *in rem*, or by the filing of a bill praying the appointment of a receiver and the service of process."

These decisions would seem to clearly settle the rule that

the fact that in Pennsylvania the Orphans' Court has exclusive jurisdiction of the estates of decedents, does not exclude the equity jurisdiction of the Federal Courts in case of proper citizenship.

SECOND. As to the second branch of the argument of counsel for appellant that the proceedings in the Orphans' Court were a suit brought, and that the jurisdiction of that Court was necessarily exclusive.

In answer to this it may be replied, that the proceedings in the Orphans' Court for the settlement of the estate of a decedent are not in any sense a "suit." The estate is called for the purpose of determining claims against it, and distribution of the balance among those entitled thereto. The true aspect of the proceeding is thus stated by Chief Justice Gray, in

Du Vivier *vs.* Hopkins, 116 Mass. 125:

"The whole proceeding is a proceeding for the settlement of an estate, according to the statutes and in the Courts of the Commonwealth. The demand of each creditor is a claim against the estate and not a suit between parties. * * * In short the trial of each claim, whether before the commissioners or on appeal, is a mere incident to the settlement of the estate."

The case of

Shelby *vs.* Bacon, 10 How. 56,

cited by counsel for appellant, is strongly in affirmance of this doctrine.

In that case the United States Bank, a corporation under the laws of Pennsylvania, had made an assignment for the benefit of creditors, under the act of 1836. At different periods since the assignment the trustees therein named had filed accounts with the Prothonotary of Philadelphia County, of their receipts and disbursements, which were approved by the Court of Common Pleas, and under the direction of that Court they had invested large sums of money to await certain pending litigation. A bill in equity having been filed by a creditor of

the bank in the Circuit Court for the eastern district of Pennsylvania, praying for an account from the trustees and distribution to his claim, the trustees filed a plea to the jurisdiction setting up the foregoing facts. The judges of the Circuit Court having been divided in opinion, the case was certified to the Supreme Court. The Supreme Court sustained the jurisdiction of the Circuit Court in the matter. Mr. Justice McClean, in the course of his opinion, says:

"The assignees admit, in their plea, that they have vested a large amount of assets to await the determination of certain suits still pending. Suppose they had reduced to possession the whole amount of the assets of the bank, and held them ready for distribution, could it be doubted that the complainant would have a right to file his bill in the Circuit Court, not only to establish his claim against them, but also for a proportionate share of the assets. The Circuit Court could not enjoin the Court of Common Pleas, nor revise its proceedings, as on a writ of error; but it could act on the assignees, and enforce the rights of the plaintiff against them."

The other cases cited by appellant on this branch of the case do not in any way cover the point.

Kohl *vs.* U. S., 91 U. S. 375, and Searles *vs.* School Dist., 124 U. S. 197, were both cases of appropriation by law of eminent domain. It was there held that the appropriation proceeding was a "suit" and removable as such into the Federal Courts.

Gaines *vs.* Fuentes, 92 U. S. 10, was an action to annul an alleged will, and to recall the decree of the Parish Court of New Orleans, by which it was probated. It was held to be in fact an action between parties, and removable to the Circuit Court of the United States.

Reviewing, then, briefly the questions presented: It has been seen that the Courts of the United States have marked a clear dividing line in the matter of their jurisdiction over